DOMESTICATING HUMAN RIGHTS NORMS IN THE UNITED STATES:
CONSIDERING THE ROLE AND OBLIGATIONS OF THE FEDERAL GOVERNMENT AS LITIGANT

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ABSTRACT

There is a large and ever-growing body of scholarship that considers how and whether the United States does or should incorporate international law and standards into domestic law and practice. A significant strain of the commentary and debate focuses on the domestic consequences of U.S. international human rights treaty obligations. Remarkably, there has been little distinct consideration of the role of the United States as a litigant in this literature. This Article fills that gap, considering the domestic implications of U.S. international law obligations under both the International Covenant on Civil and Political Rights and the Convention to Eliminate All Forms of Racial Discrimination in the context of federal government enforcement of individual constitutional and civil rights protections. This Article argues both that the United States has distinct obligations and interests in domesticating human rights treaty law—even law that is not formally binding on courts—when it engages in litigation. This Article concludes by recommending a set of actions that could be taken by the executive and legislative branches of the U.S. federal government to clarify and enhance the role of the federal government in advancing compliance with international human rights law when defending U.S. interests in domestic courts.

I. INTRODUCTION

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I. INTRODUCTION

More than two decades ago, the United States ratified a number of international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). When the United States ratified these agreements, it declared that these two treaties were not to be self-executing, limiting their domestic law effect. Yet the treaty-makers also indicated their “understanding” that
these treaties would be “implemented” by officials at all levels of government (to the extent that matters covered by the treaties were under their jurisdiction) and, further, that the federal government would take action to fulfill these agreements. In a broad range of normative areas protected by these treaties, such as, for example, enforcement of constitutional provisions and laws mandating humane jail and prison conditions and prohibiting racial discrimination, there are robust civil litigation traditions in the United States, including litigation brought by the federal government to enforce statutory and constitutional protections of fundamental rights.

The understanding approved by the Senate associated with the Convention on the Elimination of All Forms of Racial Discrimination (CERD) reads

The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.

The understanding approved by the Senate associated with the ICCPR reads

[T]his Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

These generally described as the “federalism understandings,” though they are not limited to explaining the U.S. structure of government. They also explicitly commit to implementation of the ICCPR and CERD by the U.S. federal, state and local governments, and pledge that the federal government will take “appropriate measures” to ensure fulfillment of the treaties.

Congress has empowered the U.S. Department of Justice (DOJ) to enforce a range of statutory schemes protecting fundamental rights, including, for example, the Civil Rights of Institutionalized Persons Act (CRIPA), which allows DOJ to file suit whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State is subjecting persons residing

https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-2&chapter=4&lang=en. The domestic law effect of non-self-executing treaties will be discussed infra Part III. This declaration, of course, was made against the background of the U.S. Constitution’s Supremacy Clause, which provides that treaties, like federal statutes and the Constitution, shall be the supreme law of the land. U.S. CONST. art. VI, cl. 2. The U.S. domestic law doctrine of self-execution is also discussed infra Part III.

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government frequently cites this federal litigation in communications to the United Nations and other international actors as evidence of U.S. efforts to maintain and ensure compliance with treaty provisions protecting human rights. Yet, to date, and in spite of the U.S. “understandings,” there has been no consistent practice of use or discussion of (or even citation to) these treaties in civil litigation brought by the U.S. federal government to protect fundamental rights, including in areas where U.S. statutory, constitutional and treaty obligations substantially overlap.

This Article tackles this lacuna and seeks to lay some of the analytical groundwork necessary to change the way the federal government


4. Indeed, in its very first report to the Human Rights Committee regarding the U.S. record under the ICCPR, the United States averred that the normative content of the treaty was duplicative of U.S. domestic law and that both private litigants and the U.S. Attorney General could bring litigation to enforce compliance with those norms. Human Rights Committee Concerning the International Covenant on Civil and Political Rights, Initial Report of States parties due in 1993: United States of America, ¶ 8, U.N. Doc CCPR/C/81/Add.4 (1994) (stating “... the fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases. For this reason it was not considered necessary to adopt special implementing legislation to give effect to the Covenant’s provisions in domestic law ...” and further asserting, regarding remedies, that, “[w]here Congress has so provided, the federal government, through the Attorney General, may bring civil actions to enjoin acts or patterns of conduct that violate some constitutional rights ... the Attorney General can sue under the Civil Rights of Institutionalized Persons Act to vindicate the rights of persons involuntarily committed to prisons, jails, hospitals, and institutions for the mentally retarded. Similarly, section 2 of the Voting Rights Act of 1965, as amended, authorizes the Attorney General to bring suit to vindicate the right to vote without discrimination based on race”). The U.S. interest in enforcing human rights treaties domestically and its treatment of domestic actions in reporting to the U.N. about U.S. compliance is discussed infra Part IV.


6. As discussed infra Part II.C., failing to incorporate consideration of U.S. international law obligations into domestic litigation implicating these obligations increases the risk that domestic law changes will place the United States in breach of these obligations (as a matter of international law) and misses a valuable opportunity to promote domestic compliance with and awareness of human rights. There is, however, a growing body of federal practice with regard to domestic enforcement of human rights in non-litigation contexts. See, e.g., How HUD Protects Rights to Housing. UNITED STATES INTERAGENCY COUNCIL ON HOMELESSNESS, http://usich.gov/issue/human-rights/human-rights-article-1/ (last visited May 10, 2015). See also Maria Foscarinis, The Growth of a Movement for a Human Rights to Housing in the United States, 20 Harv. Hum. Rts. J. 35 (2007).
approaches U.S. human rights treaty obligations when seeking to vindicate basic rights in the United States through civil litigation in U.S. courts. In particular, this Article considers the prospect of increased executive branch enforcement of the two principal non-self-executing international human rights treaties that the United States has ratified but not implemented through legislation: the ICCPR and the CERD. This Article does not consider how and whether the United States might similarly incorporate another form of international law, customary international law—which is established by the practice of states—nor does it specifically consider U.S. obligations under two other important international treaties protecting human rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention and Protocol Relating to the Status of Refugees, both of which have been at least partially implemented by legislation.\(^7\)

This Article joins a large body of scholarship discussing the incorporation of U.S. international human rights obligations into domestic law.\(^8\) For the most part, however, to the extent that this scholarship has


considered the invocation of human rights treaties in litigation, proponents have focused on litigation brought by private parties to challenge government or other misconduct (and particularly whether these treaties provide a right to do so). A few scholars have called for the executive branch to take action generally to enforce U.S. treaty obligations in the context of litigation. There has been, however, no sustained consideration of the unique context of federal enforcement of non-self-executing human rights treaties through civil litigation seeking to protect fundamental rights, nor of the interests or obligations of the U.S. government in doing so. This Article, thus, seeks to contribute both theoretically and practically by directly considering the distinct role and interests of the U.S. federal government in domesticking the ICCPR and the CERD through citation and discussion in the context of such litigation.

In Part II, this Article will explore the nature of the international law obligations imposed by those human rights treaties that the United States has ratified. It will consider the extent to which the United States can be said to have an international law obligation to invoke human rights law in domestic litigation brought by the U.S. federal government concerning fundamental rights. Part III will explore the domestic law status of non-self-executing human rights treaties in the wake of the Supreme Court’s decision in *Medellín*. It will consider the extent to which such treaties can be used as persuasive authority to indirectly facilitate compliance with U.S. international law obligations in the context of domestic litigation. In Part IV, this Article will consider the


federal government’s interest in promoting compliance with international human rights law when bringing actions to enforce laws protecting fundamental rights and, building on Parts II and III, argue that the federal government can and should invoke both the ICCPR and the CERD treaty obligations in such litigation. Part V considers specific additional actions that could be taken by both the executive and legislative branches to clarify how and when the federal government should invoke U.S. international human rights treaty obligations in domestic litigation. Part VI concludes by summarizing this Article and considering briefly areas for further research.

II. Considering U.S. International Law Obligations to Invoke Human Rights Law in the Context of Litigation

Historically, international law has been seen to leave to each individual state the discretion to select how to enforce and comply with its international law obligations within its domestic law and practice. Even under this traditionalist view, though, states could explicitly consent to taking specific domestic actions as part of—and in order to carry out—their international law obligations. Relatedly, under contemporary international law doctrine, and in the context of human rights treaties in particular, a relatively broad set of domestic acts and omissions can implicate a state’s responsibility for breach of its international law obligations. In Part II.A., this Article considers a state’s domestic duties to enforce international obligations contained in treaties and when domestic actions or failures to act can put a state in breach of its obligations. Part II.B. will then discuss the domestic implementation of human rights treaties in particular. Finally, Part II.C. considers the extent to which international law requires that the United States incorporate human rights law and standards found in the ICCPR and the CERD into domestic litigation to protect fundamental rights.

This Part will demonstrate that, although as a matter of international law neither the ICCPR nor the CERD require that the United States affirmatively implement its treaty obligations through civil litigation brought by the federal government, when the federal government chooses to protect fundamental rights through domestic litigation, the

12. Although this Article considers the domestic implementation of human rights obligations in the United States, it generally uses ‘state’ in the international law sense: to refer to nation-states. The term ‘U.S. state’ is used to refer to states in the domestic sphere.
United States must seek to ensure compliance with treaty obligations and prevent retrograde developments in law.

A. Domestic Duties to Enforce International Obligations

International law is traditionally seen to extend duties only to states, as the “subjects” of international law, but to leave to each state how to give domestic effect to its international obligations. Thus, no particular method of domestic implementation is required by international law generally, and how any given state, or domestic subdivision of a state, should give effect to any particular obligation is (under international law) largely a question of domestic law. Unsurprisingly, then, there is no general international law obligation that requires a state to make international law rights or remedies actionable in domestic courts.

13. Eileen Denza, The Relationship Between International Law and National Law, in INTERNATIONAL LAW 423, 429 (Malcolm Evans ed., 2d ed. 2006) (Stating, “[y]et international law does not itself prescribe how it should be applied or enforced at the national level. It asserts its own primacy over national laws, but without invalidating those laws or intruding into national legal systems” and that, “[t]here are almost as many ways of giving effect to international law as there are national legal systems”).

14. Louis Henkin et al., INTERNATIONAL LAW: CASES AND MATERIALS 153 (3d ed. 1993) (“States differ as to whether international law is incorporated into domestic law and forms a part of the ‘law of the land,’ and whether the executive or the courts will give effect to norms of international law or to treaty provisions in the absence of their implementation by domestic legislation.”). See also Oscar Schachter, The Obligation to Implement the Covenant in Domestic Law, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 311 (Louis Henkin ed., 1981). For an illustration of how courts frame this, take the treatment by the International Court of Justice of the Vienna Convention on Consular Relations (VCCR) notification provisions at its Article 35(1)(b), at issue in its decision in the LaGrand case, “. . . it would be incumbent upon the United States to allow the review and reconsideration of the [criminal] conviction and sentence [at issue] by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.” LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466, ¶ 125 (June 27).

15. Henkin, supra note 14, at 155 (“Since a state’s responsibility to give effect to international obligations does not fall upon any particular institution of its government, international law does not require that domestic courts apply and give effect to international obligations. (Of course, insofar as international law accords immunity from the jurisdiction of courts, say to foreign state or to its diplomats, the exercise of jurisdiction by a domestic court contrary to the limitations of international law would constitute a violation by the state.”); Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 240 (1991) (“More important—and more complicated—are the opportunities for private persons to seek redress in domestic courts for breaches of international law by States. There is no general requirement in international law that States provide such remedies. By and large, international law leaves it to them to meet their obligations in such ways as the State determines. This is sometimes expressed as ‘obligations of result’ in contrast to
It is uncontested, however, that states can (and do), by treaty and otherwise, consent to very specific obligations, including obligations regarding domestic implementation of international law. In parallel, international law has increasingly regulated the acts of, and thus provided rights and duties to, entities other than states (ranging from individuals to international organizations to corporations), with corresponding obligations for domestic legal systems. States can, thus, covenant to pass domestic legislation criminalizing specific conduct or to bring domestic prosecutions when particular conduct occurs within their jurisdiction. While some international law doctrine would (categorically) distinguish between such specific obligations to take particular domestic actions and the more general and deferential obligations discussed above, it is more accurate to view them as falling along a continuum; that states can agree to international law obligations of


16. Schachter, supra note 15, at 240 (“However, in some cases there are obligations of means—that is, specific requirements as to the procedures and agencies that are to be used for the fulfillment of the obligation of result. Such obligations of means are specified in treaties of various kinds, particularly those which are intended to benefit private persons.”).

17. Oppenheim’s International Law § 374 (Jennings & Watts eds., 9th ed. 1996) (“International law is no longer—if it ever was—concerned solely with states. Many of its rules are directly concerned with regulating the position and activities of individuals; and many more indirectly affect them.”). See also Ian Brownlie, Principles of Public International Law 32 (2d ed. 1973); Phillip C. Jessup, A Modern Law of Nations 19-20 (1948) (discussing corporations as subjects of international law).

18. See, e.g., Torture Convention, supra note 7, at 114 (requiring, at its Article 4, that, “[e]ach state party shall ensure that all acts of torture are offenses under its criminal law”). Rome Statute of the International Criminal Court, opened for signature July 17, 1998, 2187 U.N.T.S. 3, 9037 I.L.M. 1002 (stating in its preamble, “[I]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” and “the most serious crimes of concern to the international community as a whole must not go unpunished and . . . their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”). See also Anthony Aust, Modern Treaty Law and Practice 162 (3d ed. 2013).

varying degrees of specificity against a background of deference (with varying consequences for domestic implementation).  

As a corollary to considering the nature of international law obligations, it is useful to consider international law doctrine on how states come to be in breach of those obligations (for present purposes, what constitutes a breach is among the most significant aspects of the scope of the treaty obligation). Article 12 of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts of the U.N. International Law Commission (ILC) provides a helpful summary of the international law baseline: “there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.”  

The ILC commentary suggests that this simple definition captures the full breadth of acts or omissions (or combinations thereof) that can put a state in breach, including at the domestic level. As the ILC notes, a broad range of domestic conduct can trigger a violation; this, “may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out,

20. Specific tension in the doctrine can arise in the question of remedy or reparations in the event of breach. Take again the issue of the treatment by the International Court of Justice of remedy for breach of the VCCR notification requirement in the Avena and Other Mexican Nationals case, in which the court struggles to respond to claims by the United States that, among other things, the possibility of clemency (at the discretion of the governor of Texas) are adequate to remedy a breach (the treaty contains no provision on remedy in the event of a claim by an individual of a breach of Article 36).

The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under the United States constitutional law. In this regard, the Court would point out that what is critical in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention . . . The Court in the LaGrand case left to the United States the choice of means as to how review and reconsideration should be achieved, especially in light of the [domestic] procedural default rule. Nevertheless, the premise on which the Court proceeded in that case was that the process would of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned.


22. Id.
or a final judicial decision.” Depending on the specificity of the legal obligation, a broad range of domestic actions or omissions, including by the judiciary, may cause a state to be in breach of its international law obligations, and cause international responsibility to attach. In other words, while international law may not generally impose specific obligations regarding domestic implementation, a range of domestic actions or omissions can put a state in breach of general and specific international law obligations.

B. Implementing Human Rights Treaties

Following the proclamation of the Universal Declaration of Human Rights, states have developed a large body of multilateral treaties codifying and protecting a broad range of individual human rights. Because these treaties regulate the duties of states to protect the rights of individuals, their evolution has raised particularly complicated questions about when and how international law obligations must be incorporated into domestic orders and when they come to be breached. Many human rights treaties include specific obligations

23. Id.; see also JAMES CRAWFORD, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 548 (8th ed. 2012) (“If the courts commit errors in [the application and interpretation of treaties] or decline to give effect to the treaty or are unable to do so because the necessary change in, or addition to, the national law has not been made, their judgments involve the State in a breach of the treaty.”).


25. Unsurprisingly, codifying a range of individual rights and duties has required reevaluating the status of international law obligations with regard to the means of enforcement at the domestic level. For an interesting discussion of related issues, see Anne-Marie Slaughter and
that require particular actions at the domestic level in order to comply. However, the majority of human rights treaty obligations are articulated at a level of generality that leave states broad discretion regarding the means and mode of implementation.

In addition to the specific textual obligations contained in some human rights treaty provisions, there is a growing view that human rights law generally carries certain “positive” obligations—requirements that states take affirmative actions—with regard to domestic implementation and that all human rights treaty obligations must be interpreted in this light. The best-known formulation of this view, promoted by the U.N. Office of the High Commissioner for Human

William Burke-White, The Future of International Law is Domestic (Or, the European Way of Law), 47 HARV. INT’L L. J. 327 (2006). See also Scott Sheeran, The Relationship of International Human Rights and General International Law: Hermeneutic Constraint, or Pushing the Boundaries?, in ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 80, 98, 107-08 (Scott Sheeran & Sir Nigel Rodley eds., 2014) (“The legal evolution achieved through the normative growth of human rights has undoubtedly challenged the mainstream paradigm of international law. While the corpus juris of human rights is embedded in and constrained by the superstructure of international law, it has been successful in pushing and enlarging the disciplines’ boundaries.”).

26. See, e.g., Torture Convention, supra note 7 (requiring, in its Article 4, that “[e]ach state party shall ensure that all acts of torture are offenses under its criminal law.”).

27. ICCPR, supra note 24, at art. 23 (stating, “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”). See also Gerald Neuman, Subsidiarity, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 364 (Dinah Shelton ed., 2013) (“Human rights treaties impose obligations directly on states . . . . States implement their human rights obligations through their constitutions, criminal laws, civil codes, courts, administrative agencies, and public services. Some human rights obligations are defined specifically in relation to state-based institutions, such as political elections, criminal justice systems, and nationality laws. Others expressly require states to provide legal protection against acts such as discrimination, attacks on reputation, or exploitation of children. In consequence, states have the obligation and the opportunity to adopt legislation and other measures for the implementation of human rights within their territory (and sometimes elsewhere), and states have administrative, judicial, and law enforcement personnel in place to carry out those measures. These personnel may not be designated as human rights officers, and some of them may even be unaware that their duties correspond to the implementation of international obligations. Nonetheless, from the human rights perspective, they form part of a vast corps of national officials constrained by and contributing to the realization of the human rights of their populations . . . . In short, international action for human rights is normally subsidiary to national actions.”).

28. Dinah Shelton & Ariel Gould, Positive and Negative Obligations, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 562-63 (Dinah Shelton ed., 2013) (“Human rights law has a dual nature . . . the scope of state obligations is both negative and positive in nature, imposing not only a state duty to abstain from interfering with the exercise of the [a] right, but also to protect [a] right from infringement by third parties. Positive obligations are therefore considered to be obligations ‘requiring member states to . . . take actions,’ imposing a duty upon states to take affirmative steps to ensure rights protections.”).
Rights (OHCHR) and the U.N. human rights system generally, is that international human rights law requires that states take actions to respect, protect, and fulfill all fundamental human rights obligations. The following is one of the earliest and clearest articulations of this approach to human rights obligations, in the context of a discussion of the right to food:

The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfill. In turn, the obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfill (facilitate) means the State must proactively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfill (provide) that right directly.

29. International Human Rights Law, U.N. Office of the High Commissioner on Human Rights, http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx (last visited May 10, 2015) (stating, “By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil [sic] human rights.”). An important early source of this framing was the treaty body created by ICESCR, in its General Comment on the right to education (General Comment 13): “The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfill. In turn, the obligation to fulfill; incorporates both an obligation to facilitate and an obligation to provide.” Committee on Economic, Social, and Cultural Rights, General Comment No. 13, U.N. Doc. E/C.12/1999/10 (1999), http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d%29GeneralCommentNo13TheRighttoEducation28Article13%29%281999%29.aspx. This framing is attributed to Henry Shue. Henry Shue, The Interdependence of Duties, in THE RIGHT TO FOOD 85 (Philips Alston & Katarina Tomasevski eds., 1984).

Under this view, human rights treaties always create a fairly expansive set of obligations, requiring that states proactively engage in efforts to strengthen the effectiveness of rights protections. As a general matter, this doctrinal view still does not necessarily require states to take any specific domestic actions, to the exclusion of others, in order to comply with human rights law obligations. A state must take *some* affirmative action (both to *facilitate* and to *provide*) at the domestic level in order to comply with its international human rights obligations—a state cannot simply do nothing—but international law gives states broad discretion in regard to which actions they choose to take.

31. Başak Çali, *Specialized Rules of Treaty Interpretation: Human Rights*, in *The Oxford Guide to Treaties* 538-39 (Duncan Hollis ed., 2012) (“Though all human rights treaties have their own distinct context and wording, there is nevertheless significant convergence around the notion that the core interpretive task for any interpreter is to make human rights treaty provisions ‘effective, real, and practical’ for individuals as rights-holders under international law. This is sometimes called the principle of effectiveness *(at res magis valeat quam pereat)*. Effectiveness is an overarching approach to human rights treaty interpretation. It animates a range of other more fine-grained, specific interpretive principles developed in the context of each human rights treaty . . . . The first aspect of effectiveness in the human rights treaty context means that the interpretation of provisions should have real effects in term of the concrete and actual lives of individuals who are the recognized right-holders of human rights treaty law. That is, human rights interpretations must have ‘practical effect.’ . . . The second version of effectiveness offers a deeper account of what really makes a human rights provision effective. It is teleological in the sense that it goes beyond an analysis of whether an existing protection is formal or effective as a matter of fact.”). Another common framing in the human rights doctrine is between negative (*e.g.*, obligations to refrain from acting) and positive obligations (*e.g.*, obligations to take action). But most take the view that most, if not all obligations, contain both types of normative force. *See, e.g.*, Human Rights Committee Concerning the International Covenant on Civil and Political Rights, General Comment No. 31, ¶¶ 5-6, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) (“Article 2, paragraph 2 [‘Where not already provided for by existing legislative or other measures, each State Party to the present Covenant under takes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.’] provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected . . . the legal obligation under article 2, paragraph 1 [the non-discrimination provision], is both negative and positive in nature.”).

32. Some commentators derive this simple obligation from the core requirement that treaties are legally binding and must be performed by the parties—*pacta sunt servanda*. AUST, supra note 18, at 160-61 (“It goes without saying that if a party to a treaty does not perform it, that will, to the extent of the non-performance, be a breach of its international obligations to the other party or parties”); LOUIS HENKIN, *The Age of Rights* 58 (1990) (“The duty to carry out international obligations is the heart of the international legal system; and that prime duty implies an ancillary duty to cease and desist from violation and to give other satisfaction to the state or states to which the obligation was due.”).
Determining when a state breaches human rights treaty law is analytically equivalent to the general doctrinal framework suggested above in Part II.A.: evaluating whether an act or omission is not in conformity with what is required by the obligation.\(^{33}\) In its discussion of evaluating breaches, the ILC helpfully provides an example of the consideration by the European Court of Human Rights (ECHR), of a challenge to a prosecution \textit{in absentia} under the fair trials guarantees of Article 6(1) of the European Convention on Human Rights (an important regional human rights treaty):

The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of article 6 § 1 in this field. The Court’s task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved . . . . For this to be so, the resources available under domestic law must be shown to be effective and a person “charged with a criminal offence” . . . must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to \textit{force majeure}.\(^{34}\)

As the ILC explains, in evaluating breaches the key analytical insight in the ECHR’s approach is that the ECHR, “did not simply compare the result required (the opportunity for a trial in the accused’s presence) with the result practically achieved (the lack of that opportunity in the particular case.) Rather, it examined what more [the country being examined] could have done to make the applicant’s right ‘effective.’”\(^{35}\) Indeed, in the human rights field, evaluating whether state actions or omissions contributed to making a particular human right effective is a key preoccupation in the literature and jurisprudence.\(^{36}\) In short, in evaluating whether a state has breached a human rights obligation that does not specify the type of domestic action that a state must take in

\(^{33}\) See supra note 20-22 and accompanying text.


\(^{36}\) For an example of one such discussion, see Mauro Cappelletti & Bryant Garth, \textit{Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective}, 27 \textit{BUFF. L. REV.} 181 (1978). See also supra note 30.
order to comply, it is necessary to look at a state’s (positive) obligation to fulfill. This obligation is breached when a state does not take enough action to make a given right effective under domestic law.

C. Avoiding a Breach of the CERD and the ICCPR: Considering Domestic Litigation Brought to Enforce Fundamental Rights

The ICCPR and CERD both contain provisions that place specific obligations on states parties with regard to domestic implementation as well as provisions that clearly leave broad discretion to states regarding compliance. Notably, the United States has taken a reservation from a few important provisions in both, limiting its obligations accordingly. This Part treats each treaty in turn.

The ICCPR, which entered into force in 1976, and which the U.S. signed in 1977 and ratified in 1992, imposes an immediate obligation on states to comply with its provisions. With regard to domestic implementation, many ICCPR provisions directly reference steps states must take to implement the Convention. In particular, its Article 2 states:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Experts on the ICCPR, including the U.N.’s body of experts, the Human Rights Committee (the members of which are appointed and elected by states parties, and which considers reports regarding state compliance with the ICCPR), have opined that this provision provides a general obligation to “ensure the enjoyment of [the] rights [of the Covenant] to all individuals under their jurisdiction.”


38. ICCPR, supra note 24, at art. 2(2).

39. Human Rights Committee Concerning the International Covenant on Civil and Political Rights, General Comment No. 3, ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (1981); Human Rights Committee Concerning the International Covenant on Civil and Political Rights, General
ICCPR obligations can be considered, consistent with the doctrinal account provided above, to require that states take domestic measures to fulfill and make effective the rights of the Covenant. Though notably the ICCPR does recognize that, depending on a state’s legal system, some (and perhaps many) elements of this implementation obligation will be satisfied at the outset by the existing domestic legal

Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004). See also Schachter, supra note 14, at 311-12 (“The basic commitment of the parties may be characterized as an ‘obligation of result.’ . . . It is not enough for a party to say that it respects and ensures rights (the obligation of result); it must also fulfill the obligation to use the specified means required by Article 2 through its domestic legal system to give effect to the rights or to repair any violations.”).

40. SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY 13-14 (2d ed. 2004) (“Though the ICCPR imposes duties upon States in the international plane of law, it is envisaged that the implementation of the rights therein is primarily a domestic matter. . . . Thus, States Parties have an international duty to translate the ICCPR guarantees into domestic rights for individuals. The actual domestic protection afforded to ICCPR rights depends on the legal and political system of the relevant state party.”). See also Thomas Buergenthal, To Respect and to Ensure: State Obligations and Permissible Derogations, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 77 (Louis Henkin ed., 1981) (“The obligation assumed by the states parties in Article 2(1) consists of the dual undertaking ‘to respect’ and ‘to ensure’ the rights recognized in the Covenant. A state complies with the obligation ‘to respect’ the rights designated in the Covenant by not violating these rights. This undertaking governs any governmental measure or state action by any official or authority at any level of government. The obligation ‘to ensure’ these rights encompasses the duty ‘to respect’ them, but it is substantially broader. While the language is general and the travaux preparatoires are not explicit, the provision implies an affirmative obligation by the state to take whatever measures are necessary to enable individuals to enjoy or exercise the rights guaranteed in the Covenant, including the removal of governmental and possibly also some private obstacles to the enjoyment of these rights. The obligation to ‘ensure’ rights creates affirmative obligations on the state—for example, to discipline its officials and to improve administration of criminal justice and the immigration laws . . . .”). But see Schachter, supra note 14, at 313 (“When we turn to the text of Article 2 of the Covenant, we find no requirement that the Covenant be incorporated into domestic law . . . . These conclusions based on the text are in keeping with the positions taken by several governments in the course of the preparatory work relating to Article 2. It was clear to the drafting committees that many states did not provide for automatic incorporation and that in these countries the Covenant would not become part of the domestic law nor would it be directly applied by the courts. The United States representative on various occasions laid emphasis on this situation by proposing that all states parties be placed on the same footing as those which would not make the Covenant itself effective as national law. To this end, a U.S. proposal [which was not adopted] went as far as to require that ‘the provisions of the Covenant shall not themselves become effective as national law.’ . . . Eleanor Roosevelt, the U.S. representative in the Human Rights Commission, put it rather dramatically when she said ‘to begin to enforce the Covenant as such, instead of the law in conformity therewith, would throw the United States courts and other law-enforcing agencies into utter confusion.’”); MARC J. BOSSUT, GUIDE TO THE ‘TRAVAUX PREPARATOIRES OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 62 (Martinus Nijhoff ed., 1987).
architecture. ICCPR Article 2(3) also directly addresses domestic implementation, requiring that states provide an “effective remedy” to individuals in the event of a breach of any of the ICCPR rights, and that that remedy be “determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of that State” and, when so determined, “to ensure that the competent authorities shall enforce such remedies when granted.” Importantly, then, ICCPR Article 2 clearly imposes an obligation on states to implement the ICCPR domestically, including through such means as legislation, and also in providing access to effective, individual remedies for breach of the ICCPR. Yet, these obligations still leave states with broad initial discretion as to the specific pathways for implementation consistent with the treaty.

The ICCPR contains a number of substantive provisions protecting individual rights that also reference specific means of domestic implementation. Generally, these are provisions that require that rights be protected by domestic law in states parties’ legal orders. For example,

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41. ICCPR, supra note 24, at art. 2(2) ("where not already provided").

42. ICCPR, supra note 24, at arts. 2(3)(a)-(c). See also Oscar Schachter, Editorial Comments: The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights, 73 Am. J. Int’l L. 462 (1979); Schachter, supra note 14, at 313 (“The drafters of the Covenant considered that Article 2(3) should in some way reflect the general view that judicial remedies were especially important. They did so by adding to subparagraph 2(b) a general commitment of states to ‘develop the possibilities of judicial remedy.’ Although this phrase is somewhat less than a precise legal requirement to take specific action, its inclusion is not without legal implications. At least it presents the parties to the Covenant with an opportunity, if not an injunction, to consider whether judicial review of legislation by domestic courts should not be an element in developing the possibilities of judicial remedy.”).

43. Schachter, supra note 42, at 464 (discussing Article 2(3)’s obligation that states provide a remedy for breach: “[i]f it is impossible or difficult for aggrieved individuals to obtain an objective determination of their rights under the Covenant (and not simply under national law), or if state organs, including the courts, diverge in practice from the proclaimed rules, it is clear that the obligations of Article 2 are not satisfied.”).

44. Human Rights Committee Concerning the International Covenant on Civil and Political Rights, General Comment No. 31, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004). See also Int’l Law Comm’n, Rep. on the Work of Its Twenty-Ninth Session, U.N. Doc. A/32/10, at 21 (1977) (discussing Article 2(2): “There can be no doubt that, in these cases, legislative means are expressly indicated at the international level as being the most normal and appropriate for achieving the purposes of the Covenant in question, though recourse to such means is not specifically or exclusively required. The State is free to employ some other means if it so desires, provided that those means also enable it to achieve in concreto the full realization of the individual rights provided for by the Covenant. All these examples . . . are of cases in which the obligation leaves the State at least an initial freedom of choice of the means to be used to achieve the result required by the obligation.”).
the ICCPR recognizes the right to life and states, “this right shall be protected by law.” These also include provisions that implicitly require specific domestic action in order to protect rights. For example, the ICCPR limits the ability of states to subject persons in conflict with the law to the death penalty, stating, “this penalty can only be carried out pursuant to a final judgment rendered by a competent court.”

For states parties that do not already protect these rights under domestic law, then, these provisions create immediate obligations to implement the ICCPR in domestic law. For those whose domestic law does protect these rights, the state’s law and practice must continue to provide effective protection in order to fulfill this obligation.

Other provisions create general normative obligations, but do not contain any specific content whatsoever regarding steps that must be taken regarding domestic implementation. Thus, for example, while the ICCPR protects the individual right to liberty and security of person in the above-described manner (“no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”), the general protections for such persons while in detention are broad: “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” and “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

With regard to children in conflict with the law, similarly, the ICCPR provides that, “[j]uvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.” These provisions place broad requirements on states to implement the ICCPR and fulfill their treaty obligations through prospective law and practice consistent with the treaty. No provision of the ICCPR explicitly requires that governments engage in civil litigation to enforce these obligations domestically.

As noted, when the United States ratified the ICCPR, it took actions to limit the legal effect of the treaty, including a set of reservations, understandings and declarations clarifying its view of how the treaty

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45. ICCPR, supra note 24, at art. 6(1).
46. Id. at art. 6(2).
47. Id. at art. 9(1).
48. Id. at art. 10(1). However, ICCPR art. 10 also includes a number of obligations that reference particular domestic actions, including that “accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.” Id. at art.10(2) (b).
49. Id. at art. 7.
50. Id. at art. 10(3).
would—or could—create obligations for the United States. The United States did so after, as Senator Moynihan’s statement in the Congressional Record indicated, “a meticulous examination of U.S. practice to assure that the United States will in fact comply with the obligations that it is assuming.” These included five reservations that reflect this goal: first, limiting application of ICCPR Art. 20 so that it would not require “legislation or action by the United States that would restrict the right of free speech and association;” second, reserving the right to impose capital punishment on any person, with the exception of pregnant women, and including children;” third, indicating that the United States consented to be bound by the prohibition against cruel, inhuman or degrading treatment or punishment only to the extent that it “means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution;” fourth, refusing to be bound by the lex mitior principle of ICCPR Article 15—third clause of the 1st paragraph—which requires that changes to the penal law imposing lighter penalties be retroactively applied; and, finally, in spite of the fact that “the policy and practice of the United States are generally in compliance with and supportive of the Covenant’s provisions regarding treatment of juveniles in the criminal justice system,” reserving the right, “in exceptional circumstances,” to treat juveniles as adults (notwithstanding ICCPR Article 10(2)(b) and (3), and Article 14(4)) and further reserved these provisions regarding children who volunteer for military service. The U.S. declarations and understandings further reflect the manner in

51. There is an active debate regarding whether the U.S. reservations, understandings and declarations are valid under international law, given their breadth, a debate that is beyond the scope of this article. See, e.g., Human Rights Committee Concerning the International Covenant on Civil and Political Rights, General Comment No. 24, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) (“the Committee has deemed it useful to address in a General Comment the issues of international law and human rights policy that arise. The General Comment identifies the principles of international law that apply to the making of reservations and by reference to which their acceptability is to be tested and their purport to be interpreted. It addresses the role of States Parties in relation to the reservations of others. It further addresses the role of the Committee itself in relation to reservations. And it makes certain recommendations to present States Parties for a reviewing of reservations and to those States that are not yet parties about legal and human rights policy considerations to be borne in mind should they consider ratifying or acceding with particular reservations.”). See also Ryan Goodman, Human Rights Treaties, Invalid Reservations, and State Consent, 96 Am. J. Int’l L. 531 (2002); William Schabas, Spare the RUD or Spoil the Treaty: The United States Challenges the Human Rights Committee on Reservations, in THE UNITED STATES AND HUMAN RIGHTS: LOOKING INWARD AND OUTWARD 110 (David Forsythe ed., 2000).


53. Id. at 8068.
which the United States viewed the ICCPR as coextensive with a range of existing constitutional and statutory rights protections (and thus, in a sense, practically “pre-implemented” domestically before ratification).\textsuperscript{54} With the exception of the specific treaty obligations obviated by these reservations, then, the United States is bound to enforce all other ICCPR obligations, ensuring that the rights provided are effectively protected domestically (including at the state and local level).\textsuperscript{55}

The CERD, which entered into force in 1969, and which the United States signed in 1966 and ratified in 1994, also imposes an immediate obligation on states, requiring that they “undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.”\textsuperscript{56} “Racial discrimination” is defined as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.”\textsuperscript{57} The treaty thus notably prohibits intentional discrimination as well as actions that unintentionally have a discriminatory effect.\textsuperscript{58}

\textsuperscript{54} Id. at 8071 (these include understandings construing the non-discrimination provisions of the ICCPR, the rights to compensation under some of the ICCPR remedial provisions, the requirement of segregation of accused and convicted persons, the right to counsel and regarding implementation in the federal system). As noted, the United States also declared the treaty to be non-self-executing, the consequences of which will be treated in subsequent parts. Id. This article primarily considers the U.S. reservations as having direct legal effect on U.S. treaty obligations vis-à-vis other states parties. Understandings are more reasonably seen as a public interpretive guide. See Richard Gardiner, Treaty Interpretation 128 (2008) ("In some states the process which leads to approval for the state to become a party to a treaty includes submission of the treaty to a legislative or other body, often accompanied by an explanatory memorandum or other guide to the obligations in the treaty. While such guides include interpretation of treaty provisions, they are essentially unilateral understandings of the meaning to be attributed to the terms.").

\textsuperscript{55} As the Human Rights Committee has noted, the Vienna Convention on the Law of Treaties prevents states from invoking domestic law as a defense against a breach of international obligations. Human Rights Committee Concerning the International Covenant on Civil and Political Rights, General Comment No. 31, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004). See also Crawford, supra note 23, at 547; Gardiner, supra note 54, at 126.

\textsuperscript{56} CERD, supra note 24, at art. 2(1). See also Wouter Vandenhole, Non-Discrimination and Equality in the View of the Human Rights Treaty Bodies 8-9 (2005).

\textsuperscript{57} CERD, supra note 24, at art. 1(1).

\textsuperscript{58} Id. See also Vandenhole, supra note 56, at 35. ("Direct discrimination occurs when differential treatment takes place that is directly connected with a person’s association with one of the protected categories. It involves the less favorable treatment on prohibited grounds of an individual compared to someone else in comparable circumstances. Indirect discrimination occurs when a neutral measure is having a disparate and discriminator effect on different groups of people, and cannot be justified by reasonable and objective criteria.").
The CERD’s broad general obligation to take “all appropriate means” to end discrimination explicitly enumerates a number of steps to be taken by states, including those which require action regarding domestic enforcement, to eliminate discrimination, such as, “tak[ing] effective measures to review governmental, national and local policies and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;” “prohibit and bring to an end” racial discrimination, “by all appropriate means, including legislation as required by circumstances.” The CERD also obligates states to take “special and concrete measures” in order to “ensure the adequate development and protection of certain racial groups, or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”

59. CERD, supra note 24, at arts. 2(1)(a)-(d). See also Vandenhoele, supra note 56, at 187-88 (“The obligation to respect requires the state to refrain from interference, i.e. not to take any discriminatory action. In order to respect the right to non-discrimination, states are under an obligation not to adopt any discriminatory legislation or practices, and to amend or repeal discriminatory legislation as well as to bring to an end discriminatory practices or measures. The obligation to protect imposes a duty on the state to prevent third parties from discriminating. The obligation to fulfill requires the state to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards the full realization of the right to equality. The sub-obligation to facilitate necessitates the state to take positive measures to assist individuals to enjoy their right to equality. Such measures may consist of legislation, plans of action, strategies and programmes. A second important way of facilitating equality is through making available effective recourse in case of violations. The obligation to promote obliges a state to take steps to ensure that there is appropriate education and awareness raising concerning non-discrimination and equality.”).

60. CERD, supra note 24, at art. 2(2). The body of experts which considers reports regarding state compliance with CERD has provide a lengthy general recommendation discussing the nature of such measures. See Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, U.N. Doc. CERD/C/GC/32 (Sept. 24, 2009).

61. CERD, supra note 24, at art. 4(a). Indeed, the body of experts that considers reports regarding state compliance with CERD issued its first General Recommendation in order to urge states to incorporate this provision into domestic legislation. See Committee on the Elimination of Racial Discrimination, General Recommendation No. 1, U.N. Doc. A/87/18 (Feb. 24, 1972). See also Vandenhoele, supra note 56, at 191 (reviewing the practice of the CERD Committee in support of the proposition that, “ICERD is to be incorporated comprehensively into domestic law, so that the provisions of the Convention are fully reflected in domestic law. This requires inter alia the penalization of racial discrimination, as well as the access to effective protection and remedies through the competent national tribunals and other state institutions against any acts of racial discrimination.”).
However, as with the provisions of the ICCPR that specifically contemplate avenues for domestic enforcement as part of the text of the treaty obligations, such provisions of the CERD still leave some discretion to states regarding how they will be implemented within each party’s legal order. Also as with the ICCPR, the CERD contains a number of broad obligations that more clearly leave discretion to states regarding enforcement, most particularly the obligation in Article 5 to eliminate discrimination by guaranteeing to all a broad range of fundamental civil, political, economic, social and cultural rights. The CERD does not specifically require that states affirmatively bring civil litigation to enforce any treaty provision(s).

As with the ICCPR, the United States submitted a range of reservations, understandings and declarations along with its instrument of ratification when it became a party to the CERD (this time with Senator Pell noting “for the most part, [the CERD’s] provisions are consistent with existing U.S. law”). As with those submitted with the ICCPR, the United States viewed these reservations, understandings and declarations as ensuring that the CERD was already in a sense “pre-implemented” in domestic law. These included four reservations that limited U.S. obligations under the treaty: first, a refusal to accept any obligation to adopt legislation or other measures that would be inconsistent with Constitutional and legal protections of “individual freedom of speech, expression and association;” second, a refusal to accept obligations under Articles 2, 3 or 5 to enact legislation or other measures with respect to private conduct “except as mandated by the Constitution and laws of the United States;” and, third, refusing to grant a general consent conferring standing jurisdiction for the resolution of disputes under the treaty at the International Court of Justice.

62. CERD, supra note 24, at arts. 5(a)-(f). See also Theo van Boven, Discrimination and Human Rights Law, in DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM (Sandra Fredman ed., 2001) (discussing the recommendation by the CERD Committee, including in its General Recommendation No. 17, that states create international monitoring bodies to facilitate compliance with CERD, but that “[n]o model is prescribed as to the form and nature of these specialized bodies. They may take the form of national commissions for racial equality, ombudsmen against ethnic discrimination, centres or offices for combating racism and promoting equal opportunities, or bodies with wider objectives in the field of human rights.”).


64. Gay McDougall, Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination, 40 HOW. L.J. 571, 586-87 (1997) (citing statements by the U.S. DOJ).
under Article 22.  As with the ICCPR, then, with the exception of the specific treaty obligations displaced by these reservations, the United States is bound to enforce all other CERD obligations and ensuring that the rights provided are effectively protected domestically.

In summary, international law does not create a general obligation to domestically implement international treaty obligations in a particular manner. Thus, there is neither a general obligation that states must give domestic courts jurisdiction to hear international law claims, nor a general obligation for states to use civil or any form of litigation to domestically enforce compliance with international obligations. States can consent, however, to these forms of enforcement by treaty. Human rights law, too, lacks a general requirement that sovereigns implement treaty obligations judicially or through litigation. Human rights law does, though, have a unique character and imposes broad normative obligations on states to respect, protect and fulfill the rights covered therein.

The special nature of human rights obligations—and the terms of both the ICCPR and the CERD themselves—creates both general and specific obligations to implement human rights law domestically. While neither the ICCPR nor the CERD require that states use civil litigation per se to enforce treaty law, each treaty does create specific obligations to incorporate the normative content of certain provisions into positive law. Subsequent to ratification, then, any action or omission by the United States that impacts the normative content covered by the ICCPR and the CERD stands either to advance compliance with U.S. international law obligations—both by accomplishing the treaties’ general domestic implementation obligations and by ensuring that the result is not at odds with the treaty—or put the United States in breach. This Part has thus demonstrated that although international law does not specifically require that the United States use domestic litigation to enforce its international law obligations under the ICCPR and the CERD, such litigation can be a vital tool for both ensuring compliance and avoiding breach.

65. 140 CONG. REC. 14326, 14326 (1994). The United States also included a number of understandings, including related to implementation in the federal system. Id.

66. Schachter, supra note 14, at 315 (“It is widely accepted in national legal systems that domestic law should in the event of doubt as to its meaning or application, be interpreted in a way that the result would be consistent with the country’s international obligations . . . . Since all states parties [to the ICCPR] have national legislation or judge-made law relating to the rights of the Covenant and since questions of interpretation arise frequently when violations are alleged, reference to the provisions of the Covenant in such cases may prove to be a significant means to
III. THE DOUBLE BIND: DOMESTIC APPLICATION OF NON-Self EXECUTING HUMAN RIGHTS TREATIES IN THE UNITED STATES

The status of international law in the U.S. domestic legal system is far from uncontroversial; all the more so when it comes to whether U.S. courts can or must invoke international law obligations as a source of domestic law. Among the areas that has created the most confusion and controversy is the scope and implications of the U.S. domestic law doctrine of self-execution with regard to treaty obligations. The U.S. Supreme Court’s most recent consideration of the doctrine, in Medellin giving effect to the Covenant albeit indirectly.”). See also David Sloss, Treaty Enforcement in Domestic Courts, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 5 (Sloss ed., 2009) (“To the extent that domestic courts enforce the norms embodied in [human rights] treaties, governments are more likely to comply with those norms. Judicial enforcement by domestic courts is not the only factor that influences governmental compliance, but it is a significant factor.”). For a social scientific analysis of how ratification of human rights treaties can make a “positive contribution to civil rights practices” (though with the strongest effect in less stable democratic countries), see BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 165-66, 201, 362 (2009) (“International human rights treaties can work through a variety of mechanisms, but what has become clearer through this research has been the importance of their legal status and the potential to be useful in litigation. Often it is difficult to mobilize a politically influential coalition to demand that the government pay attention to the rights of the less powerful members of society. But in many countries, the courts have been a time-honored institution for protecting the rights of minorities, at least where the judiciary is competent and independent of egregious political manipulation.”).

67. Compare Carlos Vázquez, Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties, 122 HARV. L. REV. 599, 601-02 (2008) (“[O]ur Constitution establishes a straightforward rule on this subject: the Supremacy Clause declares treaties to be the “supreme Law of the Land,” just as the Constitution and federal statutes are, and instructs judges to give them effect. By virtue of this clause, treaties are presumptively enforceable in court in the same circumstances as constitutional and statutory provisions of like content”) with John Yoo, Globalism and the Constitution: Treaties, Non-Self Execution, and the Original Understanding, 99 COLUM. L. REV. 1955, 1961 (1999) (“Upon closer examination, the original understanding does not compel a reading of the Supremacy Clause that immediately makes treaties law within the United States, but instead allows the branches of government to delay execution of a treaty until Congress as a whole can determine how treaty obligations are to be implemented. Non-self-execution maintains a clear separation between the power to make treaties and the power to make domestic law, and it gives Congress the means to limit the potentially unbounded Treaty Clause.”). See also Sarah Cleveland, supra note 8, at 8 (“The cases demonstrate that since the nation’s founding, the Court has resorted to international law in constitutional analysis in a wide, and at times surprising, array of contexts. The practice is sufficiently continuous over time and broad in scope that it cannot be dismissed as episodic.”). Another area of significant debate is the domestic law status of Customary International Law, an issue not considered here. See supra note 6.

68. As John Jackson memorably suggested, “the substantial volume of scholarly writing on this issue has not yet resolved the confusion.” John H. Jackson, United States, in THE EFFECT OF TREATIES IN DOMESTIC LAW 141, 148-49 (Francis G. Jacobs & Shelley Roberts eds., 1987)
v. Texas, did not end the debate.\textsuperscript{69} This Part will explore the current state of the law in the United States regarding the status of ratified non-self-executing treaties and whether such human rights treaties create domestic law obligations. This Part seeks to identify the key principles of U.S. law regarding the relevance of non-self-executing treaty obligations to federal government involvement in civil litigation brought to protect fundamental rights, and to reconcile the double-bind with regard to implementation: the tension between binding international human rights treaty obligations and their limited domestic effect. Specifically, Part III.A. will analyze U.S. domestic law governing ratification and enforcement of non-self-executing treaties. Next, Part III.B. will survey the doctrinal support for persuasive invocation of non-self-executing treaties to promote domestic law outcomes consistent with U.S. international law obligations. This Part demonstrates that the United States can and should actively invoke non-self-executing human rights treaties to ensure consistency between its treaty obligations and domestic law.

A. The Current State of U.S. Law Governing Ratification and Enforcement of Non-Self-Executing Treaties

Other than by the number of parties (bilateral or multilateral), international law does not generally distinguish between different types of international agreements.\textsuperscript{70} U.S. law, however, has evolved a range of doctrinal distinctions determining how international agreements are viewed domestically, including distinguishing between various processes of treaty-making,\textsuperscript{71} and between different modes of implementation.\textsuperscript{72} The treaty-making distinction, between those international agreements that require the advice and consent of the Senate (and which are called treaties under U.S. domestic law) and other international agreements that do not (and which are not called treaties under

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\textsuperscript{70}. Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 ("‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"). \textit{See generally Aust, supra} note 18, at 14-15.

\textsuperscript{71}. Only some international agreements require the advice and consent of the Senate. For a discussion of the rise in the use of executive agreements, \textit{see e.g., Glen S. Krutz & Jeffrey S. Peake, Treaty Politics and the Rise of Executive Agreements} (2009).

\textsuperscript{72}. \textit{See infra} notes 78-86 and accompanying text.
DOMESTICATING HUMAN RIGHTS IN THE UNITED STATES

U.S. domestic law) originates in the Constitution.\textsuperscript{73} The key international human rights agreements considered here—the ICCPR and the CERD—were both ratified through the advice and consent process and are thus considered treaties under both international and U.S. law.\textsuperscript{74} The domestic law doctrines determining when and how duly ratified treaties create domestic legal obligations, however, does not derive from the Constitution, despite its long history.\textsuperscript{75}

The Constitution’s Supremacy Clause provides the baseline rule for the role of treaties in the domestic order when it states that, “all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”\textsuperscript{76} It is widely accepted that by explicitly including treaties in the Constitution as a form of supreme domestic law (with “supreme” meaning secondary to the Constitution, but equivalent to statutes), the founders intended to eliminate some of the significant difficulties encountered under the Articles of Confederation.\textsuperscript{77} Chief among those was to ensure consistent domestic enforce-

\textsuperscript{73} Although the Constitution vests treaty-making power with the President and Senate, it also grants the states—through the Compact Clause—the power to enter into “compacts” and “agreements” with congressional authorization. U.S. CONST. art. II, § 2; id. at art. I, § 10, cl. 1. The U.S. Supreme Court has derived the authority of the executive branch to enter into non-treaty agreements in art by implication from the Compacts Clause. Holmes v. Jennison, 39 U.S. 540 (1840). The Court has at various points affirmed that construction, such that there is little question that notwithstanding the Constitution’s textual assignment of the treaty-making power to the President and Senate, not all international agreements are considered treaties under U.S. law, subject to the advice and consent of the Senate. Dames & Moore v. Regan, 453 U.S. 654, 682 (1982) (“prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate.”).

\textsuperscript{74} 140 CONG. REC. 14326 (1994); 138 CONG. REC. 8068 (1992). There is an active debate about the domestic legal effect and questions raised by the process of the treaty-makers determining treaties to be non-self-executing in the course of ratification. See, e.g., Vázquez, supra note 67, at 599; David Sloss, Non-Self-Executing Treaties: Exposing a Constitutional Fallacy, 56 U.C. DAVIS L. REV. 1 (2002); Curtis Bradley, Intent, Presumptions, and Non-Self-Executing Treaties, 102 AM. J. INT’L L. 540 (2008); Lori Fisher Damrosch, The Role of the United States Senate Concerning ‘Self-Executing’ and ‘Non-Self-Executing’ Treaties, 67 CHI-KENT L. REV. 515 (1991). Discussion of whether part or all of either the ICCPR or CERD treaties are or are validly viewed as non-self-executing is beyond the scope of this Article. Though the Supreme Court, in dicta, has treated at least the ICCPR as non-self-executing, Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004).

\textsuperscript{75} Indeed, the Constitution’s “Supremacy Clause” treats all treaties as textually equivalent. U.S. CONST. art. VI, cl. 2.

\textsuperscript{76} U.S. CONST. art. VI, cl. 2.

ment of U.S. international law obligations.\footnote{78}

Against the constitutional backdrop of treaty supremacy, the U.S. Supreme Court and lower courts have developed a web of jurisprudence regarding the domestic effect of—and when courts can employ—treaties in the context of judicial controversies.\footnote{79} In particular, the Court has developed a distinction between so-called ‘self-executing’ treaties and ‘non-self-executing’ treaties. The seminal case (and where much doctrinal confusion begins) is\footnote{79}\footnote{80} Fosterv. Neilson, in which, in a decision authored by Justice Marshall, the Supreme Court stated that although the “[U.S.] Constitution declares a treaty to be the law of the land,” when “either of the parties [to a treaty] engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court.”\footnote{80} Thus, the Court held, the treaty in question did not directly affect the rights of a private litigant seeking to resolve a dispute over property ownership, because the terms of the treaty stipulated that additional action would be taken by Congress.\footnote{81} Notably, that reading of the treaty in question was contradicted, a few years later, in\footnote{82}\footnote{81} U.S. v. Perechman, in which Justice Marshall, again writing for the Court, indicated that the treaty wording actually required direct implementation.\footnote{82} But Foster’s doctrinal innovation remains with us.

\begin{itemize}
\item \footnote{78} Restatement (Fourth) of Foreign Relations Law of the United States § 102 cmt. a. (AM. LAW. INST., Tentative Draft No. 1, 2014) (“The treaties of the United States under the present [Articles of Confederation] are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government?”).
\item \footnote{79} Some of the Supreme Court’s earliest treaty jurisprudence applied treaties directly, such as those allocating the debt obligations under the Treaty of Peace with Great Britain. See Vázquez, supra note 67, at 619-60 (discussing Ware v. Hylton, 3 U.S. 199 (1796)).
\item \footnote{80} Foster v. Neilson, 27 U.S. 253, 314 (1829).
\item \footnote{81} Id. at 314-15 (“The [treaty] article under consideration does not declare that all the grants made by his catholic majesty before the 24th of January 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. [The treaty article] does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised [by the treaty article] must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing [statutory] laws on the subject.”).
\item \footnote{82} U.S. v. Perechman, 32 U.S. 51, 88-89 (1933) (“In the case of Foster v. Neilson, 2 Pet. 253, this court considered [the relevant] words as importing contract. The Spanish part of the treaty
\end{itemize}
Professor Carlos Vázquez has argued persuasively that domestic foreign relations law jurisprudence should be viewed as having four distinct doctrinal justifications for a (valid) determination that a treaty is non-self-executing.\(^{83}\) The first category of non-self-execution, Professor Vázquez argues, comes from courts finding that a given treaty does not create a private right of action for a litigant seeking to invoke it in a given case.\(^{84}\) The second category comes from courts refusing to give effect to a treaty that “purport[s] to accomplish something for which the Constitution requires a statute” (e.g., appropriation of money).\(^{85}\) Third, certain treaties are, constitutionally, non-justiciable by courts (and are thus found to be non-self-executing) because “they call for judgments of a non-judicial nature.”\(^{86}\) Fourth, Vázquez argues, are those treaties which, consistent with the Court’s decisions in *Foster* and *Perechman*, are non-self-executing due to a need for implementing legislation sourced in the treaty obligations themselves.\(^{87}\)

The most recent U.S. Supreme Court decision to directly consider the issue of self-execution was *Medellín v. Texas*.\(^{88}\) The case arose following successive waves of domestic and international litigation concerning the right to consular assistance—under the Vienna Convention on Consular Relations (VCCR)—of individuals awaiting execution on death row in various U.S. states. In 2004, in the *Avena and Other Mexican Nationals* case, the International Court of Justice (ICJ) ruled that the United States had breached its obligations under the VCCR and violated the rights of Jose Ernesto Medellín (and other Mexican...


\(^{84}\) Vázquez, *supra* note 67, at 629-30 (noting that this category of non-self-execution make treaties “no different from the other two forms of federal law [statutes and the Constitution], which sometimes do not give rise to particular remedies or rights of action”).

\(^{85}\) *Id.* at 599, 630.

\(^{86}\) *Id.* at 599, 630-31 (again noting that this strand of the lower court’s non-self-executing doctrine is parallel to domestic jurisprudence regarding non-justiciability generally, including cases finding statutes too vague for judicial enforcement or a finding of non-justiciability because a constitutional provision required discretion that can only be exercised by the political branches).

\(^{87}\) *Id.* (noting that this rule is the only doctrinal form of the rule of non-self-execution which applies to treaties alone).

nationals). Afterwards, before the Supreme Court, Medellín unsuccessfully argued that Article 94 of the U.N. Charter, through which U.N. member states agreed to “undertake to comply” with decisions of the ICJ to which they were a party, required that the state of Texas review and reconsider his VCCR claims, which had not been timely raised and were thus otherwise lost under Texas procedural default rules.

The Medellín majority opinion, authored by Chief Justice Roberts, finds that Article 94 is a non-self-executing treaty obligation. The Court, then, takes as its task determining, “whether the Avena judgment has automatic domestic legal effect such that the judgment of its own force applies in U.S. state and federal courts,” and finds that, in the absence of implementing legislation the judgment is, “not automatically binding domestic law.” The Court makes numerous statements to the effect that, “while the ICJ’s judgment in Avena creates an international law obligations on the part of the United States, it does not of its own force constitute binding federal law.”

In the time between the Avena judgment and the Medellín argument before the Court, in part due to Texas’ refusal to take any action to implement the ICJ judgment, President Bush issued a Memorandum stating that “the United States will discharge its international obligations under the decision of the International Court of Justice . . . by having State courts give effect to the decision.” The Court in Medellín, then, also finds that this Memorandum is ineffective and that the President cannot, “unilaterally convert a non-self-executing treaty into a self-executing one,” a responsibility which “falls to Congress.” In so finding, the Court relies in part on Justice Jackson’s well-known three-part framework from Youngstown Sheet & Tube Co. v. Sawyer for analyz-
ing executive action, which distinguishes between the authority of the executive when he or she acts either pursuant or against an express or implied authorization of Congress (the first and third categories) and when he or she acts in the absence of a congressional grant or denial of power.96 The Majority indicates that in its view the Memorandum did not fall within the first category (in which Congress implicitly granted authority), as “[a] non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has implicitly authorized the President—acting on his own—to achieve precisely the same result.”97 Thus, the Court rejects the argument that the President can unilaterally compel U.S. state court compliance with the ICJ decision by Memorandum. With the caveat that, “none of this is to say . . . that the combination of a non-self-executing treaty and the lack of implementing legislation precludes the President from acting to comply with an international treaty obligation,” the Court concludes that, “the Executive cannot unilaterally execute a non-self-executing treaty by giving it domestic effect. That is, the non-self-executing character of a treaty constrains the President’s ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts.”98

There is, of course, significant debate regarding the meaning, scope and consequences of Medellín—including because the Court did not clearly consider the effect of the Constitution’s Supremacy Clause as the textually-prescribed default rule for determining the domestic effect of treaties, nor did the Court grapple with some of the practical difficulties of their textual approach for determining that Article 94 was non-self-executing, given contemporary international legal practice.99 The Supreme Court has yet to take another opportunity to clarify the doctrine of non-self-execution and there is not a clear consensus view among scholars about Medellin consequences (nor will this Article seek to propose one). However, the American Law Institute’s current draft

96. Id. at 524-25 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 637-38 (1952) (Jackson, J., concurring)).
97. Id. at 527.
98. Id. at 530. See also Brief for Constitutional and International Law Scholars as Amicus Curiae Supporting Respondents, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984), http://media.debevoise.com/publications/pdf/TexasconstitutionalandselvescholarsamicusMedellin2007.PDF.
Restatement (Fourth) of Foreign Relations Law is broadly consistent with Professor Vazquez’s framework above for understanding non-self-executing treaties, and eschews the narrowest readings that Medellín might support. But in spite of this, the decision in Medellín leaves little, if any, room for arguments by the executive branch in favor of direct application of non-self-executing human rights treaty provisions directly as rules of decision in the context of litigation brought by the federal government. Whatever clarity and space may develop in future jurisprudence, it is likely to be fairly restrictive with regard to the power of non-self-executing human rights treaties to provide binding rules of decision for domestic courts (or the President’s ability to so order) in order to carry into effect U.S. international law obligations.

B. Indirect Enforcement: Using Persuasive Authority to Ensure Compliance with International Law

That non-self-executing treaties do not create rules of decision binding courts in litigation does not mean that they cannot have any effect on the law or the development of law. Indeed, independent of any room for domestic enforcement left open by Medellín, there is broad support for the proposition that domestic law should be interpreted in such a way as to avoid violating U.S. international law obligations, including those imposed by non-self-executing treaties.

Jurisprudential support for this view dates to another seminal Marshall opinion in the 1804 Charming Betsy case that lends its name to what is now a canon of statutory interpretation that requires that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” As the American Law Institute’s Restatement (Third) of Foreign Relations Law notes, the Charming Betsy canon has repeatedly been applied by the Supreme Court to treaty obligations. Commentators have also noted that lower courts have applied the canon to ensure continued compliance


101. Id. § 101 cmt. b (“The issue of self-execution simply addresses whether the treaty or treaty provision is directly enforceable in the courts as such, or whether a judicial rule of decision must be established through another source of law.”).


with non-self-executing treaties and with the ICCPR in particular.\textsuperscript{104}

ALI’s draft Restatement (Fourth) of Foreign Relations Law, like the Third Restatement before it, takes the same position with regard to avoiding conflicts with federal statutory law,\textsuperscript{105} but arguably takes an even more expansive general view regarding the interaction between other forms of domestic law and treaty obligations. Although not finalized, it is a persuasive formulation of a legally available view of how non-self-executing treaties should be treated by the federal government in the wake of \textit{Medellín}. Most notably, the current draft Restatement would not require any ambiguity in order to apply the canon:

If a treaty or treaty provision is non-self-executing, a rule of decision that would satisfy the treaty obligation may be afforded by other existing or subsequently enacted domestic law . . . .

Treaties are the supreme law of the land, and whether a treaty or a treaty provision is self-executing or non-self-executing does not affect the obligation and authority of the United States to ensure compliance with its treaty commitments as a matter of domestic and international law.\textsuperscript{106}

This is consistent with what some scholars have called “interpretive enforcement” of international law.\textsuperscript{107} Similarly, the current draft Restate-
ment (Fourth) takes the position that “the United States may... discharge its treaty obligations through pre-existing law... or executive action at the national, State, or local level.” Interpretive enforcement is arguably consistent with the otherwise restrictive treatment of treaty law in Medellín. This interpretive approach might be termed an “enhanced Charming Betsy canon.” It should be read to impose a domestic law obligation—arguably derived from the U.S. Constitution—to avoid breach of all U.S. international law obligations,
including those derived from non-self-executing treaties, and seeking in all cases a rule of decision that reconciles both.\textsuperscript{111}

In sum, as there is not significant jurisprudential support for the view that U.S. non-self-executing treaty obligations can be invoked by litigants to serve as a rule of decision in domestic litigation, the executive branch is thus limited in its ability to carry these treaty obligations into effect in a way that creates rules for the Courts. There is, however, robust support for the authority of litigants to invoke non-self-executing treaty obligations in order to promote interpretive enforcement of those obligations and promote U.S. law outcomes—and rules of decision for domestic courts—that avoid breach of U.S. international law obligations. The door is thus open for executive branch actions, including legal action brought to directly enforce U.S. constitutional or statutory law, to incorporate human rights law in this manner.

\textsuperscript{111} Harold Hongju Koh, \textit{Agora: The United States Constitution and International Law: International Law as Part of Our Law}, 98 Am. J. Int’l L. 43, 56 (2004) ("... transnationalists suggest that particular provisions of our Constitution should be construed with decent respect for international and foreign comparative law. When phrases like 'due process of law,' 'equal protection,' and 'cruel and unusual punishments' are illuminated by parallel rules, empirical evidence, or community standards found in other mature legal systems, that evidence should not simply be ignored. Wise American judges did not do so at the beginning of the Republic, and there is no warrant for them to start now."). While the focus of this Part is domestic law authority, the interpretive approach is broadly supported by comparative law and practice. David Sloss, \textit{Domestic Application of Treaties}, in \textit{The Oxford Guide to Treaties} 367, 380-85 (Duncan Hollis ed., 2012) ("Courts... frequently apply an interpretive presumption that statutes should be construed in conformity with the nation’s international legal obligations, including obligations derived from both treaties and customary international law. This interpretive presumption is sometimes called a 'presumption of conformity' or a 'presumption of compatibility'. ... Courts in Australia, Canada, Germany, India, Israel, the Netherlands, Poland, South Africa, the United Kingdom, and the United States, among other countries, have applied the presumption in cases involving... treaty provisions to help ensure that government conduct conforms to the nation’s international treaty obligations. ... There is broad agreement that courts may apply the presumption in cases where the statute is facially ambiguous. The Supreme Court of Canada has gone further, holding that, 'it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation.' Justice Kirby advocated a similar approach in Australia, arguing that courts should refer to international treaties 'not only when there exists statutory ambiguity, but also where the construction of the statute would result in an interpretation contrary to international human rights standards.' However, the majority of the Australian High Court has rejected this approach... Courts in both monist and dualist States apply treaties to help elucidate the meaning of constitutional provisions. South Africa and India are two leading examples of States where courts routinely invoke treaties and other provisions of international law in the context of constitutional interpretation... Courts in Canada, Germany, Israel, and Poland also apply treaties to help interpret domestic constitutional provisions.").
in order to avoid violating the normative obligations contained in ratified non-self-executing treaties, such as the ICCPR and the CERD.

IV. ENFORCING HUMAN RIGHTS NORMS IN CIVIL LITIGATION BROUGHT BY THE FEDERAL GOVERNMENT

Parts II and III have illustrated an under-explored area of tension between international law and U.S. domestic law regarding U.S. enforcement of human rights treaty obligations. International human rights law makes clear that the United States has an obligation to incorporate the international treaties it has ratified into domestic law. U.S. domestic law, however, does not recognize ratified non-self-executing human rights treaties as binding, decisional, law in the context of litigation. Because the ICCPR and the CERD are non-self-executing,\(^{112}\) they do not create rights that can be enforced directly in court, either by private litigants or the federal government. However, there is broad authority to support use of non-self-executing treaty obligations in parallel with domestic law to ensure enforcement of domestic law in a way that is consistent with United States treaty obligations. Part IV.A. considers the federal government’s interest in promoting domestic compliance with international law in this manner when bringing actions to enforce protection of fundamental rights. Part IV.B. then suggests two strategic approaches the federal government should consider when invoking these non-self-executing international human rights treaties as persuasive authority in civil litigation concerning fundamental rights. It does so through two case studies illustrating how easily these treaties could be incorporated into U.S. federal government litigation.

A. The Federal Interest in Consistent Protection of Fundamental Rights

The U.S. federal government has a significant interest in incorporating non-self-executing human rights treaty obligations into domestic actions to protect fundamental rights. Doing so would satisfy U.S. interests and obligations in facilitating U.S compliance with international law by ensuring the development of domestic fundamental rights jurisprudence that is consistent with treaty law.\(^{113}\) Indeed, as shown

\(^{112}\) See *supra* note 74 and accompanying text.

\(^{113}\) It is important to acknowledge at the outset of this Part that the United States executive branch has participated to a limited extent in civil litigation to which it was not a party brought under the Alien Tort Claims Act or Alien Tort Statute, and which raised human rights claims. 28 U.S.C. § 1350 (Westlaw through Pub. L. No. 114-9). Though outside of the scope of this Article for a number of reasons, including because such interventions are not reflective of an effort by the
below, U.S. treaty-makers (both the President and the Senate) have explicitly identified domestic compliance with human rights law as an important interest of the United States.\textsuperscript{114} Directly incorporating human rights law into domestic civil litigation as persuasive authority would also facilitate judicial and public education about U.S. international law obligations in a world of increasingly transnational legal obligations.\textsuperscript{115}

As demonstrated in Part II, the ICCPR and the CERD—subject to the U.S. reservations—create international law obligations for the United States. These international law obligations require that the United States take both general and specific measures to implement and ensure compliance with aspects of the conventions domestically as well as to ensure that all of the rights enumerated in each treaty are effectively protected for individuals subject to U.S. jurisdiction. While these obligations do not create an affirmative duty requiring that the United States bring civil actions to enforce treaty obligations in U.S. courts, to the extent that convention rights are protected by coextensive domestic Constitutional and statutory rights, the outcome of domestic fundamental rights cases and controversies is legally significant: any court decision can readily put the United States in breach of its treaty obligations. For these reasons, among others, the United States has a significant interest in considering the implications for U.S. obligations under non-self-executing treaties for any position taken in domestic litigation to which it is a party. Incorporating non-self-executing treaty obligations into legal arguments as persuasive authority supporting U.S. litigation positions thus stands to ensure normative consistency between domestic law and U.S. international law obligations and prevent a breach.

\textsuperscript{114} See infra notes 117-23 and accompanying text.

\textsuperscript{115} Incorporating non-self-executing treaties in this manner would also give the executive branch many more opportunities to influence the manner in which these treaties are interpreted by the judicial branch, given the deference given to executive branch interpretations of international law. See \textsc{Restatement (Third) of Foreign Relations Law of the United States} § 326(2) (Am. Law. Inst. 1987).
The very manner that U.S. treaty-makers (both the executive branch and the Senate) have pursued ratification of major human rights treaties demonstrates support for ensuring domestic implementation and thus full and consistent compliance with U.S. international obligations under these treaties. In preparing human rights treaties for ratification, the President and Senate have been careful to highlight that U.S. law already generally complies with a given treaty, and that proposed “reservations, understandings and declarations” eliminate any areas of legal conflict.116 One goal of the treaty-makers has thus been to ensure that, upon ratification, the United States would be in full compliance with its treaty obligations (that the conventions would essentially be “pre-implemented”).117 The domestic process leading to U.S. ratification of the ICCPR provides a ready example.

President Carter first submitted the ICCPR and the CERD to the Senate for advice and consent in February of 1978 (along with the International Covenant on Economic, Social and Cultural Rights and the American Convention on Human Rights, neither of which the United States has since ratified). In doing so, he emphasized this view:

The great majority of the substantive provisions of these four treaties are entirely consistent with the letter and spirit of the United States Constitution and laws. Wherever a provision is in conflict with United States law, a reservation, understanding or declaration has been recommended. The Department of Justice concurs in the judgment of the Department of State that, with the inclusion of these reservations, understandings and declarations, there are no constitutional or other legal obstacles to United States ratification . . . . By giving its advice and consent to ratification of these treaties, the Senate will confirm our country’s traditional commitment to the promotion and protection of human rights at home and abroad.118


117. Stewart, supra note 116, at 1206-07.

The same view was echoed by President George H.W. Bush years later in a letter to Senator Pell, in an effort by the executive branch to resume the advice and consent consideration of the ICCPR in the Senate:

The Covenant codifies the essential freedoms people must enjoy in a democratic society, such as the right to vote, freedom of peaceful assembly, equal protection of the law, the right to liberty and security, and freedom of opinion and expression. Subject to a few essential reservations and understandings, it is entirely consonant with the fundamental principles incorporated in our own Bill of Rights.119

And the Foreign Relations Committee, in reporting out the ICCPR for the vote of the full Senate, addressed the issue at length:

The overwhelming majority of the provisions in the Covenant are compatible with existing U.S. domestic law. In those few areas where the two diverge, the Administration has proposed a reservation or other form of condition to clarify the nature of the obligation being undertaken by the United States. This approach has caused concern among some private groups and individuals in the human rights field who argue that U.S. law should be brought into conformance with international human rights standards in those areas where the international standards are superior. The Committee recognizes the importance of adhering to internationally recognized standards of human rights. Although the U.S. record of adherence has been good, there are some areas in which U.S. law differs from the international standard. For example, the Covenant prohibits the imposition of the death penalty for crimes committed by persons below the age of eighteen but U.S. law allows it for juveniles between the ages of 16 and 18. In areas such as these, it may be appropriate and necessary to question whether changes in U.S. law should be made to bring the United States into full compliance at the international level. However, the Committee anticipates that changes in U.S. law in these areas will occur through the normal legislative process. The approach taken by the

Administration and the Committee in its resolution of ratification will enable the United States to ratify the Covenant promptly and to participate with greater effectiveness in the process of shaping international norms and behavior in the area of human rights. It does not preclude the United States from modifying its obligations under the Covenant in the future if changes in U.S. law allow the United States to come into full compliance. In view of this situation, ratification with the Administration’s proposed reservations, understandings, and declarations is supported by a broad coalition of human rights and legal groups and scholars in the United States, notwithstanding concerns any of them may have with respect to particular conditions.  

Parallel statements regarding U.S. domestic compliance marked the renewed efforts of the Clinton Administration to promote Senate provision of advice and consent to the CERD, which the Senate did.

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120. Committee Comments, reproduced at 31 I.L.M. 645, 650 (1992). Indeed, the Senate Committee report explaining U.S. understanding regarding the United States taking “appropriate measures” to ensure compliance with its obligations under the ICCPR states, “[t]he proposed understanding is . . . intended to signal to our treaty partners that the U.S. will implement its obligations under the Covenant by appropriate legislative, executive and judicial means, federal or state as appropriate.” Senate Foreign Relations ICCPR Committee Report, S. Exec. Doc. No. 102-23, at 18 (1992).

121. Letter of Strobe Talbot to Senator Claiborne Pell, S. Exec. Doc. No. 103-29 (1994) ("Contemporary U.S. domestic law provides strong protections against racial discrimination in all fields of public endeavor, as well as effective methods of redress and recourse for those who despite these protections nonetheless become victims of discriminatory acts or practices. Accordingly, as indicated in the enclosed analysis, subject to a few necessary reservations and understandings, the requirements of this treaty are consistent with existing U.S. law."). Indeed, this robust view regarding the way in which U.S. law already complied with CERD explains the Administration’s response to the question, “if ratified by the Senate, what is the likelihood that the nondiscrimination norms declared by the Convention, which are in many respects broader than current domestic law, would be directly incorporated into, or otherwise influence judicial development of, U.S. law?” in which it stated, “Ratification would not in and of itself enable litigants to challenge discriminatory acts on the basis of the treaty . . . . Given the extensive non-discrimination provisions already present in U.S. law, there is no discernible need for the establishment of additional causes of action or new avenues of litigation to enforce the essential requirements of the Convention. It is of course open to U.S. courts, as they consider it appropriate, to have reference to decisions of other judicial systems and international bodies. Given the extensive body of case law under federal non-discrimination law, we believe that ratification of the Convention will have little foreseeable influence on the future development of judicial interpretations." Id.
In 1994. In its analysis of the CERD, the Clinton Administration emphasized that the ability of private litigants and the federal government to enforce a range of Constitutional and statutory civil rights protections in court, “provides extensive remedies and avenues for seeking redress for acts of discrimination.” Indeed, among the remedies and avenues cited as a mode for seeking redress for acts that violate the CERD, the Administration specifically described the civil rights enforcement mandate and actions of many executive branch agencies, noting, “where Congress has so provided, the federal government may itself bring civil actions to enjoin acts or patterns of conduct that violate constitutional rights.” In short, there is clear evidence of the importance placed by both U.S. executive and legislative branch treaty-makers on ensuring domestic compliance with both the ICCPR and the CERD at the time of ratification.

There is also evidence that the treaty-makers viewed domestic law, including litigation brought by the federal government, as a ready vehicle for ensuring continued compliance with these treaties thereafter. In its engagement with the U.N., the United States has repeatedly pointed to developments in U.S. domestic law and practice regarding fundamental rights to demonstrate continued compliance (and its interest in continued compliance) with its international law obligations under these non-self-executing human rights treaties. More recently, in the preparation of various reports to the U.N., the federal government has also articulated these interests to U.S. state governors, tribal leaders and city mayors. Thus, in discussing U.S. law at the very outset of its

122. Committee Comments, S. Exec. Doc. No. 103-29 (1994) (“In general the provisions of the Convention are compatible with U.S. statutory and domestic law and practice. In those few areas where U.S. law and the Convention differ, the Administration has proposed a reservation or other form of condition to clarify the nature of the obligation being undertaken by the United States.”).

123. State Dep’t Analysis, S. Exec. Doc. No. 103-29 (1994) (citing and discussing jurisprudential treatment of the 13th, 14th and 15th Amendments to the Constitution as well as the 1866 and 1871 Civil Rights Acts, the Civil Rights Act of 1964, and particularly its Titles II, VI and VII, the Voting Rights Act of 1965 and the Fair Housing Act).

124. Id. (discussing the work of the DOJ Civil Rights Division, the Equal Employment Opportunities Commission, the U.S. Commission on Civil Rights, the Department of Education Office for Civil Rights, the work of the Assistant Secretary for Fair Housing and Equal Opportunity within the Department of Housing and Urban Development, the Office of Civil Rights within the Department of Health and Human Services, and authorities within the Department of Labor).

125. This administration sent multiple rounds of correspondence to governors, local officials, such as mayors, and tribal leaders. Letter from Mary McLeod, Principal Deputy Legal Advisor, U.S. Dep’t of State, to Tribal Leaders (Feb. 18, 2014); Letter from Mary McLeod, Principal Deputy Legal Advisor, U.S. Dep’t of State, to State Governors (Feb. 18, 2014);
first report to the U.N. regarding U.S. compliance with the ICCPR, submitted in 1994, the United States reported to the U.N. that, “[t]he Constitution thus provides binding and effective standards of human rights protections against actions of all levels of government throughout the nation.” That report continues to describe the U.S. position regarding its compliance with all relevant ICCPR provisions, citing and interpreting U.S. domestic legal provisions throughout.

In its analysis, for example, of U.S. compliance with ICCPR Article 7—which obligates the United States to ensure that individuals are free from torture or cruel, inhuman, or degrading treatment or punishment, and to which the United States consented (subject to a reservation that the United States interprets its treaty obligations as coextensive with federal Constitutional law)—the United States points to a range of provisions of and judicial decisions construing the federal Constitution and statutes and regulations that determine the scope of the rights of persons deprived of their liberty as evidence of U.S. compliance. These include those that give the federal government the ability to bring litigation to protect those rights. The United States has continued to do so in subsequent ICCPR reports, reporting in detail on both criminal prosecutions and civil enforcement actions brought by the federal government to ensure protection of persons deprived of their liberty as evidence of compliance with the ICCPR.


127. Id.

128. Id. ¶¶ 149-87.

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In its most recent report, submitted in 2011, in describing the Attorney General’s enforcement of the Civil Rights of Institutionalized Persons Act, the United States stated that the Department of Justice’s Civil Rights Division, “has utilized this statute to prosecute allegations of torture and cruel, inhuman, and degrading treatment or punishment.”

In reporting to the U.N. regarding compliance with the CERD, the United States has similarly highlighted enforcement of domestic law as a mechanism for ensuring compliance with U.S. international law obligations. For example, in its first report submitted regarding the CERD, in 2000, the United States stated that, “[t]here is no single statute, institution or mechanism in the United States by which internationally recognized human rights and fundamental freedoms are guar-


131. In its first report to the U.N. regarding CERD, the United States trumpeted that

As a functioning, multi-racial democracy, the United States seeks to enforce the established rights of individuals to protection against discrimination based upon race, colour, national origin, religion, gender, age, disability status, and citizenship status in virtually every aspect of social and economic life. Federal law prohibits discrimination in the areas of education, employment, public accommodation, transportation, voting, and housing and mortgage credit access, as well as in the military and in programmes receiving federal financial assistance. The Federal Government has established a wide-ranging set of enforcement procedures to administer these laws, with the U.S. Department of Justice exercising a major coordination and leadership role on most critical enforcement issues.

anteed or enforced. Rather, domestic law provides extensive protections through various constitutional provisions and statutes” and then describes, at some length, examples of “[s]everal parts of the Federal Government [which] bear special responsibilities for matters directly relevant to th[is] Convention.”\textsuperscript{132} In short, there is no question that the United States consistently articulates its strong interest in implementing its international treaty obligations under the ICCPR and the CERD and construes a range of U.S. law and practice enforcing domestic constitutional and statutory rights and obligations as a key mechanism for doing so.

Incorporating human rights law into domestic civil litigation brought by the federal government would not just reconcile the statements and practice of U.S. treaty makers, it would also promote transparency about the manner in which international law binds the United States. As a number of other commentators have noted, incorporating human rights law into domestic litigation can serve as an important vehicle for judicial education in an increasingly transnational legal system.\textsuperscript{133} Making reference to international human rights law—even if only as persuasive authority—in the context of federal litigation would make clear to the public and to judges that the United States takes its international law obligations seriously. Indeed, it is precisely the kind of action that could fulfill the U.S. understanding attached upon ratification to both the ICCPR and the CERD: a commitment to take “appropriate measures” to ensure domestic “fulfillment” of the conventions.\textsuperscript{134}


\textsuperscript{134} 140 CONG. REC. 14326, 14326 (1994) (“The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.”); 138 CONG. REC. 8068, 8071 (1992) (“This Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.”).
B. Invoking Non-Self-Executing Human Rights Treaties in Litigation to Protect Fundamental Rights

There is no robust tradition of discussion of or citation to U.S. human rights obligations in the context of civil actions brought by the federal government to protect fundamental rights. Given the domestic law authority for persuasive invocation of non-self-executing human rights treaty law, including to promote and ensure domestic law outcomes consistent with U.S. international law obligations, the federal government should modify its practice in the context of such litigation. It could do so in two ways: First, in a more assertive approach, the federal government could invoke U.S. international law obligations under non-self-executing treaties to promote evolution or expansion of domestic law norms consistent with those obligations. Second, in a more limited approach, the federal government could invoke international law obligations only to the extent that they are clearly coextensive with domestic law norms.

Two areas in which the U.S. federal government has in recent years pursued domestic civil rights enforcement actions, and that correspond to international obligations under both the ICCPR and the CERD, help illustrate the latter approach. The first is a case study of federal actions to protect the rights of institutionalized persons, and application of the ICCPR. The second is a case study considering federal anti-discrimination enforcement actions, and application of the CERD.

1. ICCPR Case Study: Actions to Protect the Rights of Persons Deprived of Liberty

Congress has conferred on the Attorney General the authority to institute civil actions to remedy egregious or flagrant violations of the rights of persons who reside or are confined in state institutions (i.e., jails and prisons, juvenile facilities, medical or psychiatric facilities)."
The Department of Justice (DOJ) has used this authority to commence actions involving pre-litigation investigation\(^{137}\) culminating in litigation, against municipalities and U.S. states.\(^{138}\)

In 2013, the U.S. government reported to the Human Rights Committee on U.S. compliance with the ICCPR, specifically about investigations by DOJ’s Civil Rights Division regarding what the United States described as, the “misuse of solitary confinement” and described various ways in which such physical and social isolation in jails, prisons and juvenile facilities could violate U.S. law, including cases of solitary confinement of persons with serious mental illness and juveniles.\(^{139}\) In

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\(^{137}\) The statute is structured to promote pre-litigation resolution of disputes, as it requires the Attorney General to first notify and consult with the appropriate state or local official regarding the findings and propose remedial actions as well as the Attorney General’s attempt to file suit. § 1997(a)(1)-(2). Not surprisingly, then, most CRIPA actions are not judicially-resolved, and thus for present purposes, this analysis will treat CRIPA “findings letters” as federal government pre-litigation documents, representative of the theories that the executive branch would pursue in court filings.

\(^{138}\) Access to the pleadings and findings letters associated with much of the Department’s work is available here: [http://www.justice.gov/crt/about/spl/findsettle.php](http://www.justice.gov/crt/about/spl/findsettle.php).

2013 remarks to the relevant U.N. committee of experts as part of the U.S. delegation reporting regarding U.S. compliance with the CERD, then-U.S. Attorney (and now Attorney General) Loretta Lynch described efforts by the DOJ to promote “reduction of the use of solitary confinement” as part of the DOJ’s effort “to improve our criminal justice system in furtherance of our human rights obligations.”

In its communications with the U.N. regarding the ICCPR, the U.S. government has cited to a number of DOJ actions as representative of this effort, and yet none of the relevant pre-litigation or litigation documents cite to U.S. international human rights obligations.

Future elements of the DOJ’s effort to reduce the use of solitary confinement in the United States should directly cite to international human rights law. The United States could do so in the second manner suggested above, invoking U.S. non-self-executing treaty obligations under the ICCPR and construing them as normatively coextensive with what the Constitution and other laws of the United States require and, reciprocally, construing U.S. constitutional and statutory law as coextensive with the treaty. This would be simple.

For example, in a recent action seeking a temporary restraining order challenging the solitary confinement of children in an Ohio juvenile facility, the Department stated that “[e]xcessive seclusion of juveniles is inherently punitive and violates the Fourteenth and Eighth Amendments to the Constitution.” To that, the Department could have added something to the effect of:

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141. Compare the United States reporting to the U.N. about the DOJ investigation of the use of solitary confinement in the Pennsylvania Prison system, with the court findings letter in that case, in which the ICCPR is not discussed. Human Rights Committee Concerning the International Covenant on Civil and Political Rights, Replies of the United States of America to the List of Issues, ¶ 74, U.N. Doc. CCPR/C/USA/Q/4/Add.1 (Sept. 13, 2013); U.S. Dep’t of Justice, Findings Letter on Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation (May 31, 2013); U.S. Dep’t of Justice, Findings Letter on Investigation of the Pa. Dep’t of Corrections’ Use of Solitary Confinement on Prisoners with Serious Mental Illness and/or Intellectual Disabilities (Feb. 24, 2014).

142. Motion for a Temporary Restraining Order by the United States, U.S. v. Ohio, at 13 (S.D. Ohio 2014) (No: 2:08-cv-475-ALM-MRA). Jurisdiction for this act was in part supported, not by CRIPA, but by the civil rights provision of the Crime Control Act at 42 U.S.C. § 14141 (Westlaw through Pub. L. No. 114-9), which will be discussed in greater detailed in Part IV.B.ii.
The United States has also determined that the solitary confinement practices challenged here additionally implicate U.S. international law obligations under the International Covenant on Civil and Political Rights, which the U.S. has signed and ratified as non-self-executing. In particular, these practices are inconsistent with the Convention’s prohibition on torture and other cruel, inhuman or degrading treatment or punishment, the obligation to treat all persons deprived of liberty with humanity and respect for the inherent dignity, and the general obligation to prioritize rehabilitation of juvenile offenders. While, because it is non-self-executing, this ratified treaty does not provide a rule of decision for this court, it does constitute an international law obligation of the United States of America. The Constitution and laws of the United States which apply to the instant case should therefore be interpreted in a manner consistent with this treaty, in order to avoid putting the United States in breach of those obligations.

Given the Department’s many efforts to reduce solitary confinement, and its citation to these efforts as representative of continued United States compliance with the ICCPR, the DOJ should incorporate the treaty into its litigation positions—making clear that, in areas of normative overlap, courts (and U.S. state and local officials) should construe domestic law authorities in a manner consistent with U.S. treaty obligations.

2. CERD Case Study: Federal Anti-Discrimination Actions

Congress has also conferred on the Attorney General the authority to institute civil actions to remedy patterns or practices of conduct by law enforcement officials, among other U.S. state officials, that deprive

143. 31 I.L.M. 645, 649 (1992). See also supra notes 115-19 and accompanying text.
144. ICCPR, supra note 24, at arts. 7, 10.
145. See supra notes 36-43, 90-100 and accompanying text.
146. See supra notes 100-10 and accompanying text. Note also that invoking non-self-executing treaties in this manner does not require a determination that those treaties create “rights, privileges, or immunities” under U.S. law or that non-self-executing treaties are among the “laws of the United States.” However, see supra note 109 regarding the potential basis of Constitutional authority for arguing that non-self-executing treaties in many instances should be construed as among the supreme laws of the United States, under the Constitution’s supremacy clause, and as among those laws which the President should take care to ensure are faithfully executed, under the Take Care Clause.
persons of “rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” The DOJ has used this authority to commence investigations\footnote{147} and bring civil litigation against municipalities and U.S. states.

In 2013, the U.S. government reported to the U.N. CERD treaty body about U.S. efforts to use civil rights authorities, which, it stated, “impose limits on the use of race or ethnicity by law enforcement,” including investigations by the DOJ under the authority of 42 U.S.C. § 1414 to “respond to such unlawful practices” within police departments.\footnote{149} While the government recounted its preference “to work in a cooperative fashion with local governments and police” in order to “spur reform,” the United States noted that the federal government “does not hesitate to use litigation to combat racial profiling or other unlawful policing when cooperation proves elusive.”\footnote{150} In 2014, Deputy Assistant Attorney General Mark Kappelhoff spoke as part of the U.S. delegation reporting to the U.N. regarding U.S. compliance with the CERD and described “ground-breaking reform agreements with police departments all across the United States,” describing this as a part of a “collective responsibility [among U.S. federal, state and local government entities] to fulfill our nation’s obligations under the [C]onvention.”\footnote{151}

\footnote{147. This is a civil rights provision incorporated in § 14141 (“(a) Unlawful conduct: It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. (b) Civil action by Attorney General: Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and: declaratory relief to eliminate the pattern or practice”). Notably, like CRIPA, this statute does not invite the Attorney General to initiate investigations for violations of U.S. treaty obligations.

148. The statute, unlike CRIPA, is not explicitly structured to promote pre-litigation resolution of disputes. However, the DOJ has published investigative reports regarding conduct of state and local officials under the authority of § 14141. Like CRIPA “findings letters,” this analysis will treat such investigative reports as federal government pre-litigation documents, representative of the theories that the executive branch would pursue in court filings.


150. Id. ¶ 82.

Future efforts to combat racial profiling and eliminate other racially discriminatory practices by police departments should directly cite to international human rights law. The United States could do so in the second manner suggested above, promoting interpretations of U.S. constitutional and statutory provisions that are consistent with normatively coextensive CERD provisions. This would also be simple. For example, in a recent (pre-litigation) investigation (brought in part under the authority to litigate provided by 42 U.S.C. § 14141) of the Ferguson Police Department in Ferguson, Missouri, the Department stated its findings that, “this investigation has revealed a pattern or practice of unlawful conduct . . . that violates the First, Fourth, and Fourteenth Amendments to the United States Constitution, and federal statutory law.” To that, the Department could add something to the effect of: “The United States has also determined that the pattern or practices identified here also implicate U.S. international law obligations under the Convention on the Elimination of All Forms of Racial Discrimination, which the U.S has signed and ratified as non-self-executing.”

In that investigation, the Department recounted striking findings that various patterns or practices of conduct by the Ferguson Police Department “disproportionately harm African Americans” and, thus, violated federal Constitutional and statutory prohibitions against discrimination. The department found significant evidence of “intentional discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment” as well as data demonstrating that such practices “impose a disparate impact on black individuals that itself violates the law” with citation to and discussion of both Title VI of the Civil Rights Act and the Safe Streets Act. To that, the Department could have added something to the effect of:

The United States has also determined that the police practices detailed here additionally implicate U.S. international law obligations under the Convention on the Elimination of All Forms of Racial Discrimination, which the U.S has signed and ratified.

153. 140 CONG. REC. 14326, 14326 (1994).
155. Id. at 63, 70-78.
156. Id. at 69-70.
as non-self-executing.\(^{157}\) In particular, these practices are inconsistent with the Convention’s requirement that states parties work to eliminate racial discrimination and guarantee the right of equal treatment before all state organs administering justice.\(^{158}\) While, because it is non-self-executing, this ratified treaty does not provide a rule of decision for U.S. courts, it does constitute an international law obligation of the United States of America.\(^{159}\) The Constitution and laws of the United States that apply to the instant case should, therefore, be interpreted in a manner consistent with this treaty, in order to avoid putting the United States in breach of those obligations.\(^{160}\)

Given the Department’s robust efforts to pursue police reform consistent with fundamental rights, and the practice of citing to those efforts as representative of continued U.S. compliance with the CERD at the international level, the DOJ should incorporate the treaty into its enforcement positions—making clear that, in areas of normative overlap, courts as well as U.S. state and local officials should construe domestic law authorities in a manner consistent with U.S. treaty obligations.

As noted by the U.S. government and others, there are many civil rights statutes that permit the federal government to bring enforcement actions to protect fundamental rights covered by U.S. non-self-executing treaty obligations.\(^{161}\) Federal agency officials who enforce civil rights statutes across executive branch agencies could—and should—incorporate U.S. obligations into their work. At a minimum, they could do so in the way described above—invoking international

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158. CERD, supra note 24, at arts. 1(1), 2(1), 5(a).
159. See supra notes 55-59, 90-100 and accompanying text.
160. See supra notes 100-110 and accompanying text. Note also that invoking non-self-executing treaties in this manner does not require a determination that those treaties create “rights, privileges, or immunities” under U.S. law or that non-self-executing treaties are among the “laws of the United States.” However, see supra note 109 regarding the potential basis of Constitutional authority for arguing that non-self-executing treaties in many instances should be construed as among the supreme laws of the United States, under the Constitution’s supremacy clause, and as among those laws which the President should take care to ensure are faithfully executed, under the Take Care Clause. As noted in supra Part II, CERD also prohibits unintentional discrimination (discrimination ‘in effect,’ not only intent). This would therefore also create an opportunity to promote more expansive interpretation of domestic law, a strategy considered more fully below.
161. See supra notes 123 and 130 and accompanying text.
law obligations that are normatively coextensive with U.S. law. But the federal government could also more assertively promote its international human rights obligations, including invoking its international law obligations to promote domestic law outcomes in areas where it believes jurisprudence construing the relevant Constitutional or statutory protections is either deficient or underdeveloped, and where it views its international law obligations as broader than existing domestic law. This could similarly create opportunities for the United States to promote progressive development or crystallization of the scope of provisions of the non-self-executing treaties to which it is a party. For example, the United States could make clear that it views the ICCPR’s non-discrimination provision, which prohibits discrimination on the basis of “other status,” to include a prohibition on discrimination on the basis of sexual orientation and gender identity and thus to cover discrimination against transgender persons.162 U.S. efforts to clarify the application of (underdeveloped) domestic law to protect against discrimination and mistreatment of transgender persons163 could thus invoke international law, for example by stating:

The United States has also determined that practices detailed here additionally implicate U.S. international law obligations under the International Covenant on Civil and Political Rights, which the U.S has signed and ratified as non-self-executing.164 In particular, these practices are inconsistent with the Convention’s prohibition against discrimination and the requirement that states parties protect the rights of all persons, including


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transgender persons, deprived of liberty.\textsuperscript{165} Furthermore, it is an obligation that is more protective than current jurisprudence treating the issue under the Constitution and laws of the United States. While, because it is non-self-executing, this ratified treaty does not provide a rule of decision for U.S. courts, it does constitute an international law obligation of the United States of America.\textsuperscript{166} The Constitution and laws of the United States which apply to the instant case should therefore be interpreted in a manner consistent with this treaty, in order to avoid putting the United States in breach of those obligations, and recognize these practices as contrary to law.\textsuperscript{167}

Assertive invocation of non-self-executing treaties to promote domestic law rules of decision that are more protective would further serve to ensure the goals and interests described above regarding the domestic implementation of the ICCPR and the CERD.

In sum, the United States has adequate authority for invocation of both the CERD and the ICCPR in domestic litigation as persuasive authorities. The executive branch could pursue such interpretive domestic enforcement of U.S. international law obligations only when international and domestic norms are normatively coextensive, to ensure that domestic law is interpreted to be consistent with international law obligations, and it could also use international law in cases where the federal government is promoting a more expansive interpretation of a domestic norm, invoking international law obligations as persuasive authority in support of these efforts. These strategic uses of international law authority derived from non-self-executing treaties would be consistent with the oft-repeated assertion by U.S. treaty makers that the United States is committed to compliance with the U.S. human rights treaties it ratifies. It would also be a ready vehicle for demonstrating to judges, government officials at all levels, and other parties to the treaty, that the United States takes these obligations seriously.

\textsuperscript{165} ICCPR, supra note 24, at arts. 2(1), 9(1).
\textsuperscript{166} See supra notes 36-43, 90-100 and accompanying text.
\textsuperscript{167} See supra notes 100-10 and accompanying text. Note also that invoking non-self-executing treaties in this manner does not require a determination that those treaties create “rights, privileges, or immunities” under U.S. law or that non-self-executing treaties are among the “laws of the United States.” \textit{But see} Medellin v. Texas, 552 U.S. 491, 530 (2008) regarding the potential basis of Constitutional authority for arguing that non-self-executing treaties in many instances should be construed as among the supreme laws of the United States, under the Constitution’s supremacy clause, and as among those laws which the President should take care to ensure are faithfully executed, under the Take Care Clause.
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V. CLARIFYING LEGAL DUTIES: THE WAY FORWARD

The foregoing Parts have sought to explore the legal equities involved in how, why and to what end the U.S. federal government can or should invoke non-self-executing treaties in the course of litigation protecting fundamental rights. Given the existing lack of federal practice in the context of litigation, Part V considers specific additional actions that could be taken by both the executive and legislative branches—beyond merely invoking non-self-executing treaties in the manner proposed in Part IV—to clarify, routinize, and expand the way the federal government treats human rights law in the context of litigation, and in particular how it treats U.S. obligations and interests with regard to non-self-executing treaties. Such clarity would be welcome given the scope of U.S. international law duties, the complicated domestic status of human rights treaty law, and U.S. interests in domestic implementation of human rights law. Part V.A. discusses the actions that could be taken by the executive branch, while Part V.B. outlines the actions available to the legislative branch.

A. Executive Branch Actions

There are many actions that could be taken by the executive branch to clarify its approach to human rights law and make consistent its efforts to protect fundamental rights at home and abroad.

At the level of the White House, the President could revitalize Executive Order (EO) 13107, first issued by the Clinton Administration, regarding domestic implementation of human rights treaties.

168. In doing so, this Article has not sought to provide an account of why the federal government does not incorporate international law into domestic litigation brought to protect fundamental rights. It is certainly possible that the DOJ and other agencies that participate in or contribute to executive branch litigation engage in significant debate and discussion about the way in which litigation brought by the federal government could impact or promote compliance with international treaties. Indeed, it is also conceivable that the government might then determine that making a given court or jurisdiction aware of U.S. international law obligations would place the federal government at a strategic disadvantage (either with regard to the potential outcome for domestic law or compliance with international law). However, there is no clear public evidence of this as, discussed in supra Part IV, which suggests the contrary.

169. Although not the subject of this Article, the United States engages in a broad range of efforts to promote human rights around the world in the context of its foreign policy. Among other places, the United States chronicles these efforts at www.humanrights.gov.

170. Exec. Order No. 13107, 63 Fed. Reg. 68,991 (Dec. 15, 1998). Civil society groups have pointed out that the Obama Administration has not consistently implemented this Executive Order, although the administration has reportedly created a new “Equality Working Group.” See,
EO 13107 was an important development in executive branch treaty policy and practice, affirming that

[I]t shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.\(^{171}\)

Most importantly for present purposes, it directed “all executive departments and agencies” to “maintain a current awareness of United States international human rights obligations that are relevant to their functions” and, further, to “perform such functions so as to respect and implement those obligations fully.”\(^{172}\) EO 13107 also created an Inter-agency Working Group with responsibility, among other things, to, “develop effective mechanisms to ensure that legislation proposed by the Administration is reviewed for conformity with international human rights obligations” as well as “mechanisms for improving the monitoring of the actions by the various States, Commonwealths, and territories of the United States and, where appropriate, of Native Americans and Federally recognized Indian tribes . . . for conformity with relevant treaties.”\(^{173}\) In short, EO 103107 was robust in committing the executive branch to coordinated action to ensure compliance with and implementation of international human rights treaty obligations, including for non-self-executing treaties.


\(^{172}\) Id. § 2.

\(^{173}\) Id. at 68,992 §§ 4(c)(iv)-(v) (1998). While EO 13107 has not been rescinded, it would seem that much of its content no longer animates executive branch practice. For example, in 2012, the Obama Administration launched the “Equality Working Group,” primarily a collaboration between the DOJ Civil Rights Division and the State Department Bureau of Democracy, Human Rights and Labor “to support better coordination throughout the United States on strengthening understanding and respect for human rights” (though primarily focused on CERD). Committee on the Elimination of Racial Discrimination, Periodic Report: United States of America, ¶ 4, U.N. Doc. CERD/C/USA/7-9 (June 12, 2013). Though it is unclear whether the Working Group has continued to function. See Letter from the Leadership Conference on Civil and Human Rights, to President Barack H. Obama (Jan. 12, 2015) (calling for the Working Group to be “reinvigorated”).
A more robust Executive Order could provide clear guidance to federal law enforcement officials, especially those charged with civil rights enforcement, regarding obligations under U.S. non-self-executing treaties, such as the ICCPR and the CERD, as well as treaties that are non-self-executing but which Congress has—in whole or in part—implemented by statute, such as the Convention Against Torture, the Refugee Convention and its Protocol, and other forms of international law, such as customary international law. An expanded Executive Order could reestablish an Interagency Working Group and specifically designate a point person at the White House or a cabinet agency, such as the DOJ or the Department of State (or individuals at both) to actively coordinate efforts by the United States to promote compliance with its international law obligations within the United States, including through litigation and to pursue domestic implementation and compliance through the practice of the executive branch. This important domestic compliance function could include review of both U.S. state and federal legislation and regulations as well as policies and practices. It could also involve developing implementation strategies to pursue opportunities for indirect implementation of non-self-executing treaties.

Short of action by the President, and in addition to the approach suggested in Part IV, individual cabinet-level officials (such as the Attorney General) or other officials (such as those within the DOJ Civil Rights Division and other departments and agencies which oversee enforcement of domestic civil rights statutes, such as the Departments of Education, Homeland Security, and Housing and Urban Development, among others) could provide guidance to their subordinates regarding the nature and means of incorporating U.S. human rights treaty obligations in executive branch practice and the enhanced Charming Betsy canon approach. Cabinet-level officials could designate individuals within their offices to coordinate implementation of this guidance and the efforts of each department or agency to take affirmative measures to ensure compliance with non-self-executing treaty (and

174. As noted above, this article does not consider domestic enforcement of obligations, such as those under the Torture Convention, which the United States has at least partially implemented by statute. See supra note 7.

175. A revised Executive Order could include new language explicitly outlining a U.S. policy and practice of pursuing indirect enforcement of non-self-executing treaties through citation as persuasive authority in the manner described in Part IV, as well as specifically committing executive departments and agencies to publicly pursue this policy in the context of litigation.
other international human rights law) obligations.\textsuperscript{176}

In addition to incorporating human rights law into executive branch practice generally, the Attorney General (either through the Office of the Solicitor General or another part of the DOJ) could develop a practice of affirmatively intervening in cases to which the United States is not a party, but that implicate U.S. human rights obligations.\textsuperscript{177} In doing so, the executive branch could clearly articulate the relevance of the case to the non-self-executing human rights treaty (and other international human rights law) obligations implicated in a statement of interest and promote indirect enforcement of U.S. international law obligations.

A consistent and proactive approach by the executive branch regarding how the United States considers and ensures compliance with its international human rights obligations, and particularly those derived from treaties which the United States has duly ratified, would be a significant development. It would help the United States avoid future breaches of those obligations and demonstrate, both domestically and internationally, how seriously the United States takes its international law obligations.

\section*{B. Legislative Branch Actions}

There are a number of steps that Congress could independently take to clarify the domestic application of human rights treaties, and to affirm the relevance of U.S. international law obligations to federal government litigation to protect fundamental human rights.

The first and broadest action would be for Congress to pass and for the president to sign statutes implementing both the ICCPR and the CERD. Such statutes could provide jurisdiction for claims based in human rights treaty provisions by a range of parties, including the federal government, and could authorize the courts to rely on the

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\item \textsuperscript{176} Among other things, for example, the U.S. attorney’s manual could be revised to explicitly include language directing those who take positions in litigation on behalf of the United States to consider U.S. non-self-executing treaty obligations as international law obligations of the United States in the course of litigation and encouraging citation to the ICCPR and CERD as persuasive authority in the context of domestic litigation. This guidance should explicate how acts or omissions by federal officials can put the U.S. in breach of its international law obligations.
\item \textsuperscript{177} The DOJ already has broad authority to do just that. 28 U.S.C. § 517 (Westlaw through Pub. L. No. 114-9) (“The Solicitor General, or any other officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”).
\end{itemize}
}
ICCPR and the CERD as rules of decision. As with the discussion regarding White House action above, this is not a new proposal, but one that groups in the United States took up immediately upon ratification of human rights treaties in the 1990s, in calls for Congress to enact the International Human Rights Conformity Act.\textsuperscript{178} Such legislation could also revoke reservations that are no longer required by U.S. law, such as the U.S. reservation against the death penalty for children, which is now prohibited under U.S. law.\textsuperscript{179}

Alternatively, Congress could enact, for the President to sign, a statute or statutes that provide jurisdiction for judicial enforcement of treaty-based rights by the federal government only, with an appropriate authorization requiring that the federal courts treat these treaty obligations as rules of decision in cases brought by the executive branch. Such a statute could be written broadly or more narrowly tailored. For example, such a statute could give all executive departments and agencies authority to pursue enforcement actions in reliance on U.S. international law obligations under duly ratified non-self-executing treaties or restrict this to the Attorney General only.\textsuperscript{180} Such a statute could give broad authority to pursue violations of treaty-based rights of any severity or frequency or limit enforcement to patterns or practices of violations by an official of a U.S. State or political subdivision of a State, or agent thereof, or any other person acting on behalf of a U.S. State or political subdivision of a State—and could also be written to give authority for enforcement in cases of violations by Federal officials or those acting on behalf of the Federal government in certain circumstances.\textsuperscript{181} As with much current executive branch civil rights practice, the statute could also be structured to promote friendly resolution of disputes, by requiring notice and consultation with the relevant agency.


\textsuperscript{179} As noted, the U.S. reservation regarding preserving the right to subject children to the death penalty was motivated by the fact that the practice, unlike other restrictions on the death penalty, was not prohibited under current U.S. law. Committee Comments, \textit{reproduced at 31 I.L.M.} 645, 649 (1992). However, applying the death penalty to children is now prohibited as a matter of constitutional law. Roper v. Simmons, 543 U.S. 551, 578-79 (2005).

\textsuperscript{180} Such a step was taken with regard to the implementation of the World Trade Organization Uruguay Round Agreements. 19 U.S.C. § 3512(c)(1) (Westlaw through Pub. L. No. 114-9) (“No person other than the United States (A) shall have any cause of action or defense under any of the Uruguay Round Agreements . . . ”).

\textsuperscript{181} This parallels CRIPA, which does not currently permit actions for violations of international treaty violations, with the addition of violations of rights by federal officials.
or department head, governor, attorney general, or the like, but could also permit litigation if treaty violations are not resolved. Finally, such a statute could cover all provisions of the ICCPR and the CERD, or be crafted to extend jurisdiction only over specific aspects of the treaties, such as those protecting persons with disabilities, related to racial discrimination, or protecting the rights of persons deprived of liberty. Many of these proposals could be accomplished by simply modifying the jurisdictional provisions of key civil rights statutes discussed in Part IV to include reference to relevant non-self-executing treaties or treaty provisions.

As illustrated above, there are a number of actions that the executive and legislative branches could take which would eliminate any ambiguity regarding the relationship between ratified non-self-executing human rights treaty obligations and the domestic law and practice of the executive branch. These actions could significantly expand and make routine federal activities to promote compliance with U.S. international law obligations through indirect, and with Congressional action, direct enforcement. Options include both assertive as well as relatively modest efforts to expand federal promotion of international human rights law domestically, starting with the limited proposal, discussed in Part IV, of merely explicitly noting circumstances in which domestic law and standards are coextensive with U.S. international obligations in litigation. But the executive branch could also go much further, including issuing a formal Executive Order with robust provisions regarding promoting domestic compliance with human rights law. The legislative branch could also take action to ensure U.S. compliance with the international law obligations contained in ratified non-self-executing human rights treaties, ranging from legislation implementing the ICCPR and the CERD, to piecemeal extensions of jurisdiction that would apply only to the federal government.

Although many of these proposals are unlikely to be implemented in the near-term, they show that a range of actions can be taken by the federal government to better ensure compliance with U.S. human rights obligations. Innovative approaches to judicial implementation of U.S. non-self-executing treaties by the federal government could provide a strong and clear statement regarding how the United States considers and ensures compliance with its international human rights obligations. Innovation would help the United States avoid future breaches of those obligations and underscore that the United States is committed to complying with its international human rights law obligations, particularly those required by the treaties the United States has already ratified.
VI. Conclusion

This Article provides a new analytical framework for considering how the United States can reconcile its robust domestic enforcement efforts to protect fundamental rights with its international obligations, as articulated in the non-self-executing ICCPR and CERD treaties. In doing so, this Article has not directly addressed two substantive topics. First, the analysis above does not consider customary international law, or how the United States might pursue direct or indirect enforcement of these obligations.\textsuperscript{182} Notably, many provisions of the ICCPR and the CERD are coextensive with norms that have crystalized into rules of international law through the custom and practice of states. Second, the analysis above does not consider how or whether the United States has engaged with the human rights treaties it has, at least in part, implemented through legislation, and particularly the Convention Against Torture and the Refugee Convention and its Protocol.\textsuperscript{183} This implementing legislation has created opportunities for litigation (civil and criminal) to which the United States is a party. Finally, this Article has focused on the unique obligations and interests of the federal government in facilitating compliance with the ICCPR and the CERD in the context of litigation to protect fundamental rights, to the exclusion of the role of private litigants.\textsuperscript{184} These issues would all be fruitful avenues for further research and analysis, likely with additional implications for the ways in which the federal government could more consistently and robustly promote compliance with U.S. international law obligations through domestic law and practice. This Article has, however, established that the United States is bound under international law to implement certain human rights obligations and that, when it chooses to protect domestic fundamental rights through litigation, it must pursue such actions in a way that ensures compliance with its international law obligations. Fortunately, there is adequate jurisprudential authority to permit the executive branch to invoke U.S. international law obligations under non-self executing treaties as persuasive authority to promote domestic law outcomes that are consistent

\textsuperscript{182} As noted, there is significant debate about the status of customary international law in the United States. See supra note 7. This article also has not considered U.S. obligations under those human rights treaties it has signed but not yet ratified, such as the ICESCR, the Convention on the Rights of the Child, the Convention for the Elimination of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities (all of which overlap in different ways with provisions of customary international law).

\textsuperscript{183} See supra note 7.

\textsuperscript{184} See supra notes 7-8 and accompanying text.
with and avoid breaching those treaties. This Article has thus further
demonstrated that the United States has a clear interest in enforcing
these international obligations and has developed theories for strate-
gic, persuasive use of human rights law in litigation brought by the
federal government to protect fundamental rights. Finally, this Article
has proposed actions that could be taken by both the executive branch
and the legislative branch, and which would provide welcome clarity on
how to reconcile domestic enforcement with international obligations.